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ASSESSING THE IMPACT OF JUDICIAL TAXATION ON LOCAL COMMUNITIES

GOVDOC
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104- 861

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1817

A BILL TO LIMIT THE AUTHORITY OF FEDERAL COURTS TO FASHION REMEDIES THAT REQUIRE LOCAL JURISDICTIONS TO ASSESS, LEVY, OR COLLECT TAXES

SEPTEMBER 19, 1996

Serial No. J–104–96

Printed for the use of the Committee on the Judiciary

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ASSESSING THE IMPACT OF JUDICIAL TAXATION ON LOCAL COMMUNITIES

THURSDAY, SEPTEMBER 19, 1996

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:04 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senator Heflin.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Before I give some opening remarks, I want to speak to a friendship that has developed in 16 years that I have served on this committee with Senator Heflin, and Senator Heflin was here a couple years before I was. He is retiring from the U.S. Senate at the end of this term. Senator Heflin has been ranking member of this committee when I have not been chairman and I have been ranking member of this committee when he has been chairman. There are not very many subcommittees in the Congress where you would have this sort of teamwork over a period of that long, 16 years.

I want to tell Senator Heflin that I have enjoyed working with him and that I am going to miss not only him as a person and his friendship but also what he has lent to the legislative process and particularly his contribution to the work of this subcommittee.

I have enjoyed working with you, Senator Heflin, and I will miss not being able to work with you in the future. We disagree on very little. The two of us have worked on this subcommittee, as I suggested, as a team for a long, long period of time. In that time, I have grown to genuinely like you and respect your abilities as a legislator. Many of my colleagues have commented on what a great Senator and great person you are.

Just thinking about what I was going to say at this moment, because this is probably, with two weeks left, the last meeting that we have as a subcommittee chairman, and I thought of that old church hymn, "Howell Great You Are". [Laughter.]

Or, you could say, "How Great Howell Art". [Laughter.]

So, Senator Heflin, you are truly a great Senator and the entire Senate will miss you.

Senator HEFLIN. I appreciate deeply your remarks. I have to say that I, likewise, have enjoyed working with you and think we have worked well as a team. Hopefully, we have done some things that improved the court system and the administration of justice.

I want you to come to Alabama. We can go plowing together. We are both farm boys. We will bring along another farm boy there. He is just a boy, and that is Thurmond. He is still mighty young.

Senator GRASSLEY. I will bring the ability to raise 40 bushels of beans per acre to up your yield from 27 bushels per acre.

Senator HEFLIN. We will teach you to pick cotton while you are down there. Thank you again for those remarks.

Senator GRASSLEY. You bet. Before we go to Senator Thurmond, for me and for Senator Heflin, if there are any opening remarks, I think we will do those now.

I thank everybody for being here. This afternoon, our subcommittee, the Administrative Oversight and the Courts Subcommittee, will be holding a hearing on the practical real world effect which is hit on local communities of judicial taxation orders. Although this hearing is not primarily about legislation, I have introduced legislation, as have some of my colleagues, including Senator Thurmond, who we are going to hear from shortly.

Normally, judicial taxation occurs when Federal courts issue an order compelling an enormously expensive remedy for some wrongful city action or policy. If the city cannot pay for it because it is just too expensive, the judge will resolve that problem by ordering the city simply to raise taxes. As we all know, in 1990, the Supreme Court in *Missouri* v. *Jenkins,* by a narrow margin, I might say, ruled that the Federal courts may, in fact, force communities to raise taxes.

As I said earlier, I have introduced legislation dealing with judicial taxation. Under my bill, which proposes not to ban all judicial taxation but to severely limit the ability of courts to use this extreme remedy, courts would have to show that an order requiring taxes be paid is absolutely necessary to remedy some wrongful action.

[The above mentioned bill, S. 1817, follows:]

II

104TH CONGRESS
2D SESSION

S. 1817

To limit the authority of Federal courts to fashion remedies that require local jurisdictions to assess, levy, or collect taxes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 23, 1996

Mr. GRASSLEY (for himself, Mr. HATCH, Mrs. KASSEBAUM, and Mr. BOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To limit the authority of Federal courts to fashion remedies that require local jurisdictions to assess, levy, or collect taxes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness in Judicial Taxation Act of 1996".

SEC. 2. FINDINGS.

The Congress finds that—

(1) a variety of effective and appropriate judicial remedies are available under existing law for the full redress of legal or constitutional violations;

(2) the imposition, increase, levying, or assessment of taxes by courts is not necessary or appropriate for the full and effective exercise of remedies imposed by Federal courts with appropriate jurisdiction;

(3) the imposition, increase, levying, or assessment of taxes by judicial order is—

(A) not an appropriate exercise of the judicial power under the Constitution; and

(B) incompatible with—

(i) the traditional principles of the laws and Government of the United States; and

(ii) the basic American principle that taxation without representation is tyrannical (because Federal courts are composed of unelected officials who are not answerable to the popular will);

(4) when a Federal court issues an order that requires or results in the imposition, increase, levying, or assessment of any tax, the court—

(A) exceeds the proper boundaries of the limited jurisdiction and authority of Federal courts under the Constitution; and

(B) impermissibly intrudes on the legislative functions of the democratic system of government of the United States;

(5) no court should enter an order or approve any settlement—

(A) remedying a legal or constitutional violation by imposing, creating, increasing, levying, or assessing any tax; or

(B) that has the effect of imposing, creating, increasing, levying, or assessing any tax;

(6) a settlement agreement or order entered by a Federal court should be fashioned within the framework of the budgetary restraints of any affected State or political subdivision thereof; and

(7) the Congress has the authority under sections 1 and 2 of Article III of the United States Constitution to limit and regulate the jurisdiction of the inferior Federal courts, and such authority includes the power to limit the remedial authority of such courts.

SEC. 3. LIMITATION ON FEDERAL COURT REMEDIES.

(a) IN GENERAL.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1369. Limitation on Federal court remedies

"(a)(1) No district court may enter any order or approve any settlement that requires any State, or political subdivision of a State, to impose, increase, levy, or assess any tax for the purpose of enforcing any Federal or State common law, statutory, or constitutional right or law, unless the court finds by clear and convincing evidence, that—

"(A)(i) there are no other means available to remedy the deprivation of rights or laws; and

"(ii) the proposed imposition, increase, levying, or assessment is narrowly tailored to remedy the specific deprivation at issue;

"(B) the tax will not contribute to or exacerbate the deprivation intended to be remedied;

"(C) the proposed tax will not result in a loss of revenue for the political subdivision in which it is assessed, levied, or collected;

"(D) the proposed tax will not result in the loss or depreciation of property values of the taxpayer so affected;

"(E) the proposed tax will not conflict with the applicable laws with respect to the maximum rate of taxation as determined by the appropriate State or political subdivision thereof; and

"(F) plans submitted to the court by State and local authorities will not effectively redress the deprivations at issue.

"(2) A finding under paragraph (1) shall—

"(A) be subject to immediate interlocutory de novo review; and

"(B) be reviewed by the court making the finding at least annually with respect to the issues related to the finding, whether or not a related order or settlement agreement continues to apply.

"(3)(A) Notwithstanding any law or rule of procedure, any aggrieved corporation, or unincorporated association or other person residing or present in the political subdivision in which a tax is imposed in accordance with paragraph (1) or other entity located within that political subdivision shall have the right to intervene in any proceeding concerning the imposition of the tax.

"(B) A person or entity that intervenes pursuant to subparagraph (A) shall have the right to—

"(i) present evidence and appear before the court to present oral and written testimony; and

"(ii) appeal any finding required to be made by this section, or any other related action taken to impose, increase, levy, or assess the tax that is the subject of the intervention.

"(b) Notwithstanding any law or rule of procedure, any order of a district court requiring the imposition, increase, levy, or assessment of a tax imposed pursuant to subsection (a)(1) shall automatically terminate or expire on the date that is 1 year after the later of—

"(1) the date of the imposition of the tax;

"(2) the date of the enactment of the Fairness in Judicial Taxation Act of 1996; or

"(3) an earlier date, if the court determines that the deprivation of rights that is addressed by the order has been cured to the extent practicable.

"(c) This section may not be construed to preempt any law of a State or political subdivision thereof that imposes limitations on, or otherwise restricts the imposition of a tax, levy, or assessment that is imposed in response to a court order referred to in subsection (b).

"(d)(1) Except as provided in paragraph (2), nothing in this section may be construed to allow a Federal court to, for the purpose of funding the administration of an order referred to in subsection (b), use funds acquired by

a State or political subdivision thereof from a tax imposed by the State or political subdivision thereof.

"(2) Paragraph (1) does not apply to any tax, levy, or assessment that, before the date of enactment of the Fairness in Judicial Taxation Act of 1996, has, in accordance with applicable State or local law, been used to fund the actions of a State or political subdivision thereof in meeting the requirements of an order referred to in subsection (b).

"(e) The court shall provide written notification to a State or political subdivision thereof subject to an order referred to in subsection (b) with respect to any finding required to be made by the court under subsection (a) before the beginning of the fiscal year of that State or political subdivision.

"(f) There shall be a presumption that the imposition, increase, levying, or assessment of taxes is not a narrowly tailored means of remedying deprivations of Federal or State rights.

"(h) For purposes of this section—

"(1) the District of Columbia shall be considered to be a State; and

"(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.".

(b) CONFORMING AMENDMENT.—The chapter analysis for chapter 85 of title 28, United States Code, is amended by adding after the item relating to section 1368 the following new item:

"1369. Limitation on Federal court remedies.".

(c) STATUTORY CONSTRUCTION.—Nothing contained in this Act and the amendments made by this Act shall be construed to, beyond the scope of applicable law, make legal, validate, or approve the use of a judicial tax, levy, or assessment by a district court.

○

In the *Jenkins* case, the court permitted a tax which was far broader than necessary and which was imposed without a satisfactory showing that justice could be achieved through some other means. Under my bill, the court would have to show that an order requiring that taxes be raised was the only possible way to remedy wrongful action. Importantly, my bill also permits any local citizen who would be impacted by the tax to intervene in the case. If judges are going to try to raise taxes, I believe the people who are going to have to pay the taxes ought to have something to say about it. After all, no taxation without representation is one of the cornerstones of our Nation.

Another related issue I hope to address today is the role of special masters in all of this. Special masters are court-appointed administrators who will gather information and make proposals to courts about various issues related to structural injunctions. I have been told that special masters travel around from place to place, making their living by helping Federal courts take over portions of local government, and it appears that special masters have an economic incentive to never recommend reducing Federal court control because then the master and his or her staff would be out of a job. I hope that we can learn something about this problem today.

I know that the city of Rockford, IL, may be on the verge of a judicially-imposed tax increase. I look forward to hearing from Congressman Manzullo, who represents Rockford, and from Mr. William Neblock of the Rockford School Board.

So, in conclusion, this hearing is about Federal judges taking over local government and forcing towns and cities to raise taxes.

Now I would turn to Senator Heflin, if you have any opening remarks.

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. I would like to thank you for arranging these hearings. Unfortunately, we are at the end of a legislative Congress, which is a two-year period. Under the circumstances, I do not think probably anything can be passed. But it does set the stage for more of a national debate relative over the next few months and perhaps years, relative to this issue.

Since the time of our forefathers, as they boarded the ships in Boston Harbor and poured tea over the side in protest of taxes that the crown had imposed upon them, we have held firmly in the belief that no tax should be levied without those who are levying them being held accountable to the citizens. And as we all know, Federal judges of our nation are appointed for life and they are not elected by the public.

Judicial taxation is a fairly recent issue being addressed by our Federal courts and judicial taxation is a term used when a court approves a settlement or makes an order which would necessitate a new or increased tax on a municipality or other unit of local or of State government. It is a remedy of last resort, which is evident by the statement of Supreme Court Justice White in the Kansas City, MO, School District case which set the precedent for the compelling interest.

It might be interesting to note that, basically, this is a case where they had said that Kansas City would have to have magnet schools in the desegregation case. The issue arose and there was a limit in regards to taxation of so much per $100 of assessed value of property and that that could not be raised without a vote of the people. So the Missouri School Board could not raise it and they raised that as a defense and the Supreme Court held that in carrying out the orders pertaining to the desegregation that those were not impediments against raising it and they ordered really judicial taxation.

Senator Grassley in introducing this bill made an excellent speech and in that speech he says that we cannot by statute overturn *Missouri* v. *Jenkins*. We do not have the votes to pass a constitutional amendment. And since the Supreme Court has spoken, we are stuck with judge-imposed taxes. The Fairness in Judicial Taxation Act, which he introduced at that time, goes as far as we can. The bill sets up a six-part test which would be met before a judge can compel the raising of taxes. In brief, before the court could impose a tax, the judge would have to prove certain things and then he sets forth six guidelines pertaining to it.

So as we have this hearing and the debate starts, we want to explore all of this because I think we feel that Congress is the place where taxes should be imposed. They are legislators that are elected by the people. In a State situation where, in this instance, the school board was elected, as I recall, and they were accountable to the people.

So judges are not accountable to the people in this end and clearly, the Constitution of the United States and the Constitution of all of the States clearly show that the power of taxation is vested in the legislative branch and not the judicial branch. So we will want to look at this and see what guidelines could be imposed constitutionally relative to this that would, in effect, certainly limit the matter of judicial taxation.

Senator GRASSLEY. Thank you.

We now go to our first panel, the President Pro Tem, Senator Thurmond, is here and will be first, and then Congressman Manzullo. Senator Thurmond has introduced his own legislation in this area. That is S. 51, I believe. Congressman Manzullo has introduced in the House a bill similar to mine or a companion of mine. I would ask both of you, after you testify, if you want to participate—Senator Thurmond is a member of the committee, and I would invite him to stay if he wants to, and Congressman Manzullo, if you would stay and listen to the testimony, you would be invited up here to be beside me.

Senator Thurmond, would you please go ahead?

STATEMENT OF THE HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you very much, Mr. Chairman.

I want to thank Congressman Manzullo for allowing me to go first. I do have an emergency and I appreciate his kindness.

Just before giving my statement, I would like to make a very brief comment on Senator Heflin. I will pay him a tribute later on the Senate floor. I just want to say it has been a pleasure to serve

with him in the Senate of the United States. He is a man of integrity, ability, and dedication, has made an outstanding lawmaker, and we are going to greatly miss him.

Senator HEFLIN. Thank you.

Senator THURMOND. Mr. Chairman, I am pleased to testify today as we assess the impact of judicial taxation on local communities. As you know, Mr. Chairman, in 1990, the Supreme Court decided in *Missouri* v. *Jenkins* to allow Federal judges to order new taxes or tax increases as a judicial remedy. It is my firm belief that this narrow five-to-four decision permits Federal judges to exceed their proper boundaries of jurisdiction and authority under the Constitution.

Even before the *Jenkins* decision, I had introduced legislation to prohibit Federal judges from ordering new taxes or ordering increases in existing tax rates as a judicial remedy. Senator Dole and I reintroduced a bill in this Congress, S. 1708, to protect the American people from judicial taxation.

The Judicial Taxation Prohibition Act that Senator Dole and I introduced is narrowly drafted legislation to prohibit Federal judges from ordering new taxes or ordering increases in existing tax rates. I believe it is clear under Article III that the Congress has the authority to restrict the remedial jurisdiction of the Federal courts in this fashion.

Mr. Chairman, not since Great Britain's ministry of George Grenville in 1765 have the American people faced the assault of taxation without representation as now authorized in the *Jenkins* decision. As part of his imperial reforms to tighten British control in the colonies, Grenville pushed the Stamp Act through the Parliament in 1765. This act required excise duties to be paid by the colonists in the form of revenue stamps affixed to a variety of legal documents. This action came at a time when the colonies were in an uproar over the Sugar Act of 1764, which levied duties on certain imports such as sugar, indigo, coffee, linens, and other items.

The ensuing firestorm of debate in America centered on the power of Britain to tax the colonies. James Otis, a young Boston attorney, echoed the opinion of most colonists, stating that the Parliament did not have power to tax the colonies because Americans had no representation in that body. Mr. Otis had been attributed in 1761 with the statement that "taxation without representation is tyranny."

In October of 1765, delegates from nine States were sent to New York as part of a Stamp Act Congress to protest the new law. It was during this time that John Adams wrote in opposition to the Stamp Act, and I quote, "We have always understood it to be a grand and fundamental principle that no freeman shall be subject to any tax to which he has not given his own consent, in person or by proxy."

A number of resolutions were adopted by the Stamp Act Congress protesting the acts of Parliament. One resolution stated, and I quote, "It is inseparably essential to the freedom of our people that no taxes be imposed on them but with their own consent, given personally or by their representatives." The resolutions concluded that the Stamp Act had a manifest tendency to subvert the rights and liberties of the colonists.

Other Americans reacted to the Stamp Act by rioting, intimidating the tax collectors, and boycotts directed against England. While Grenville's successor was determined to repeal the law, the social, economic, and political climate in the colonies brought on the American Revolution. The principles expressed during the earlier crisis against taxation without representation became firmly embedded in our Federal Constitution of 1787.

Yet, the Supreme Court has overlooked this fundamental lesson in American history. The *Jenkins* decision extends the power of the judiciary into an area which has traditionally been reserved as a legislative function within the Federal, State, and local governments. In the Federalist No. 44, James Madison explained that in our democratic system, the legislative branch alone has access to the pockets of the people.

This idea has remained steadfast in America for over 200 years. Elected officials with authority to tax are directly accountable to the people, who give their consent to taxation through the ballot box. The shield of accountability against unwarranted taxes has been removed now that the Supreme Court has sanctioned judicially imposed taxes. The American people lack adequate protection when they are subject to taxation by unelected, life-tenured Federal judges.

There are many programs and projects competing for a finite number of tax dollars. The public debate surrounding taxation is always intense. Sensitive discussions are held by elected officials and their constituents concerning increases and expenditures of scarce tax dollars. To allow Federal judges to impose taxes is to discount valuable public debate concerning priorities for expenditures of a limited public resource.

Mr. Chairman, the dispositive issue presented by the *Jenkins* decision is whether the American people want, as a matter of national policy, to be exposed to taxation without their consent by an independent and insulated judiciary. I most assuredly believe they do not.

The Constitution provides Congressional authority to limit the remedial jurisdiction of lower Federal courts which are established by the Congress. Article III, Section 1 of the Constitution provides jurisdiction to the lower Federal courts as the "Congress may from time to time ordain and establish." There is no mandate in the Constitution to confer equity jurisdiction to the inferior Federal courts. Congress has the flexibility under Article III to ordain and establish the lower Federal courts as it deems appropriate. This basic premise has been upheld by the Supreme Court in a number of cases.

The legislation that Senator Dole and I introduced would preclude the lower Federal courts from issuing any order or decree requiring imposition of any new tax or to increase any existing tax or tax rate. I firmly believe that this language is wholly consistent with Congressional authority under Article III, Section 1 of the Constitution. There is nothing in this legislation which would restrict the power of the Federal courts from hearing constitutional claims. It accords due respect to all provisions of the Constitution and merely limits the availability of a particular judicial remedy which has traditionally been a legislative function.

The objective of this legislation is straightforward, to prohibit Federal courts from increasing taxes. The language in this bill does not deny claimants judicial access to seek redress of any Federal constitutional right.

Mr. Chairman, how long will it be before a Federal judge orders tax increases to build new highways or prisons? I do not believe the Founding Fathers had this type of activism in mind when they established the judicial branch of government. The role of the judiciary is to interpret—I repeat, to interpret—the law. The power to tax is an exclusive legislative right belonging to the Congress and governments at the State level. We are accountable to the citizens and must justify any new taxes. The American people deserve a timely response to the *Jenkins* decision and we must provide protection against the imposition of taxes by an independent judiciary.

I wish to thank the committee very much for their kindness in hearing me at this time.

Senator GRASSLEY. Senator Thurmond, we thank you very much. I want to make clear to you, as I think Senator Heflin made clear from my statement when I introduced my bill, I saw my bill as not better than yours from the standpoint that we all want to restrict the courts on doing something that the legislative branch of government normally does, but I did not see our getting the two-thirds vote to do it, and since you could not overrule the courts by legislation, I wanted to make sure that we had some restriction on the courts. But the philosophy that only the legislature should raise taxes or decrease taxes or have power over taxation is clear, as far as I am concerned.

Do you have any questions?

Senator THURMOND. Mr. Chairman, I think we can accomplish our goal by statute. Of course I will be pleased to work with you.

Senator GRASSLEY. We have no questions. Go ahead, Senator Thurmond.

Is anyone here from Congressman Manzullo's office? I believe he went to vote on the House floor. We will break into the next panel when the Congressman comes back.

At this time I would like to enter into the record the prepared statements of Senators Bond and Kassebaum.

[The prepared statements of Senators Bond and Kassebaum follow:]

PREPARED STATEMENT OF HON. CHRISTOPHER BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Chairman Grassley, thank you for allowing me to present my views on this important issue. While I believe that our Constitution is very clear on the separation of powers between the branches of our government and which branch possesses the power of the tax, the Supreme Court has affirmed the precedent that a federal court may judicially impose taxes as a remedy to a constitutional wrong. I believe that this unfortunate reading is an unconstitutional usurpation of exclusive legislative authority. In 1990, my colleague, Sen. John Danforth, and I introduced an amendment to the Constitution to prohibit the imposition of taxes by the Federal judiciary. Our amendment sought to clarify further the clearest of language, but his unfortunate precedent has survived. I have eagerly signed on this legislation as an original co-sponsor and pledge my support and energy in ensuring its passage.

I am certain the members of this committee are to some extent familiar with the decision in the case of *Missouri* v. *Jenkins*. In my home State of Missouri, a federal district court became an eager participant in the effort to integrate the public schools in the Kansas City area. The court affirmed an extravagant and extensive

remedy fashioned by the local school board that far exceeded the budget, the available financial means, and the authority to tax of both the school board and the state. The district court then, in all its wisdom, imposed a sharp increase in the property taxes of the residents of the Kansas City school district to pay for this remedy. The court's ruling, in effect, overruled strict provisions in incorporated in the Missouri Constitution for raising taxes. Ensuring the rights of all students to enjoy equality in their public education is a guaranteed right and an important goal; the ruling of the court, however, was an unconscionable disregard for local rule and the will of the people of Missouri.

The holding of the Supreme Court in *Missouri* v. *Jenkins* upheld an order directing the school board to impose an increased property tax, again despite the mandate of the state constitution. The ruling of the Court eliminated state-law limitations on the school board, or any institution, on taxing authority. Any judicial finding of constitutional obligation would thus permit the Court impose taxes as a remedy, upholding the encroachment on the exclusive jurisdiction of the legislative body.

Personally, I do not see any ambiguity in the Constitution. Article I § 1 states that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives". Article 1 of § 8 is among the articles listing the legislative powers of the Congress; it states that "Congress shall have the Power to Lay and Collect Taxes * * *". Article III describes the powers of the federal judiciary, and nowhere in Article III does anything resembling the word tax appear. The Tenth Amendment proceeds to reserve all powers not delegated to the federal government to the states and to the people. The power to levy a tax is not a judicial function; it is exclusively within the power of the legislative branch. I draw upon the words of James Madison in Federalist Paper number 48 to assist me in reaching that conclusion; in our system of government, he stated, "the legislative department alone has access to the pockets of the people".

I do not think that the Supreme Court could be more misguided than by granting life-tenured federal employees the power of taxation. Taxation is clearly a power that belongs in the hands of those that are most accessible to the people and those that must answer to the people. A legislator's very presence in a legislative body reflects the will of those he serves. I have heard criticism that this legislation seeks to limit a power that the judiciary does not possess. I agree with that assessment, but this precedent has survived for six years and I am anxious to work with this Committee to craft a bill that will correct this unfortunate precedent.

PREPARED STATEMENT OF HON. NANCY LANDON KASSEBAUM, A U.S. SENATOR FROM THE STATE OF KANSAS

I am grateful for the opportunity to submit testimony to be included in the record on the topic of judicial taxation. Senator Grassley has taken an active lead on this issue, and I commend him for holding hearings to further examine the ramifications of this problem.

My interest in the issue of judicial taxation grew out of the experience of the Kansas City, Missouri, school system. In that case, the federal judge has essentially taken over the school system by imposing a tax on the local population in order to finance implementation of a magnet school plan. His intervention, I would argue, has created an undercurrent of ill will, exacerbated racial tension, and done little to solve, over the long term, the problems with the Kansas City school system.

School desegregation is not an easy issue. It is fraught with emotion, and there are no magic answers. But imposing a comprehensive solution from the bench—without the support of the community—has not proven effective. We simply must find a better approach to this problem—an approach which brings a community together.

I, for one, have strongly supported neighborhood schools. One of the real strengths of our education system has been in its local base. The sense of connection among students, parents, school officials, and communities is a vitally important source of support for children. When education loses its roots in the neighborhood, we lose the commitment and emphasis which are critical to academic success.

Moreover, at a time when the stresses and outright breakdown of many families have denied to children the strong and positive messages they should be receiving from parents, the sense of connection and belonging that a school can provide becomes even more vital.

I fear that complex, Rube Goldberg solutions involving busing, magnet schools, and such—financed by judicially imposed taxes—undermine community support for effective schooling. The business at hand is to guarantee that all our students have

an opportunity for a quality education in their neighborhoods. That is where we should devote our energies and our financial resources.

I was, therefore, pleased to join with Senator Grassley as an original cosponsor of S. 1817, the "Fairness in Judicial Taxation Act of 1996." This legislation addresses some of the problems inherent in judicial taxation by requiring judges to undergo the same sort of analysis any effective legislature would undertake before imposing a tax on its people. I hope that Senator Grassley's continued efforts to more clearly define the role of the judiciary in this matter will allow communities to again work together to improve education for all their children.

I would like to have our second panel come up and I would like to start with your testimony, with the understanding that I will let the Congressman speak when he gets back. Our next panel is a very distinguished panel. We have Mr. Al Lindseth, who is a lawyer in private practice who has represented Kansas City, MO, in its effort to get out from under Federal control. He is widely respected in his field and I feel very lucky to have him be able to take time out of his very busy schedule and practice to be with us.

We also have Mr. William Neblock of the Rockford School Board. I expect that we will gain some invaluable insights from Mr. Neblock how disruptive the possibility of judicial taxes will be generally as well as on that community.

We also have Mr. Roger Pilon of the Cato Institute, who is a noted legal scholar.

Finally, we have Professor Mary Cheh, a professor at George Washington University Law Center, which, of course, is an excellent law school with an excellent reputation.

We will start with Mr. Neblock.

PANEL CONSISTING OF WILLIAM R. NEBLOCK, MEMBER, ROCKFORD SCHOOL BOARD, ROCKFORD, IL; ALFRED A. LINDSETH, SUTHERLAND, ASBILL AND BRENNAN, ATLANTA, GA; MARY M. CHEH, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC; AND ROGER PILON, SENIOR FELLOW, AND DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE, WASHINGTON, DC

STATEMENT OF WILLIAM R. NEBLOCK

Mr. NEBLOCK. Thank you, Senators. Rockford is a city in crisis. The schools have labored since 1989 under the authority of Federal Judge Stanley Roszkowski and U.S. Magistrate Judge P. Michael Mahoney.

Through 1996, the district has spent $100 million on supposed remedies for past discriminations. The district is presently carrying an overall school district debt of $150 million and is on the verge of bankruptcy. Attorney fees to date for both plaintiffs and the school district are over $12 million. If the present court remedies remain for 15 years, our community will spend over $500 million. This is an exorbitant amount of money for a city with a population of 140,000.

The school board attorneys constantly advise that any action we believe is in the best interest of the children will be viewed as "in bad faith" by the courts. In the view of the courts, any action we take is seen as non-compliant. The Rockford School Board has been put in a position of attempting to cure the social and economic problems of society while operating under the guise of desegrega-

tion and under the constant threat that the courts will remove the power of the board, impose taxes, and give the court-appointed master control of the district. I believe that this board is one word or one wrong step away from that happening. The same courts that we created to ensure justice are now bordering on injustice.

Rockford has been listed as one of the most affordable places in the country to buy a home. At the same time, Rockford is listed as one of the highest taxing districts. Homes are affordable. Homes that sold three years ago at over $200,000 have lost 25 to 30 percent of their value. Homes that sold for $130,000 to $200,000 have lost 15 to 20 percent of their value. Homes at the $100,000 to $130,000 level have lost 7.5 to 15 percent of their value.

Currently, there are more homes on the market than three years ago and they stay on the market for a longer period of time. In areas just outside district 205, new subdivisions cannot be built fast enough. Families are begging to get out of district 205. People often speak of white flight when districts are held hostage by court ordered desegregation. I believe the true term should be green flight.

Those families that can afford to leave Rockford will leave. The middle- and low-income families will again bear the burden of taxes and sub-par education. Those families and homeowners that maybe are already one step from being homeless, those who can least afford to move or leave the city will bear the taxation burden.

Inferior education would result for several reasons. Under the control of the court-appointed master, the Rockford School District is not moving ahead with programs that will increase the educational benefit of our children. They are moving ahead with hiring administrators to administrate the administration of the court order. Eugene Eubanks holds a similar position in Kansas City, MO, and was hired without any approval or accountability, bringing with him a staff of 400, including a new Associate Superintendent of Education and Equity, yet only 118 are involved in direct classroom instruction.

Rockford has curriculum developers, facilitators, coordinators, implementors, and district consultants. Some of these positions are filled by people who say that they have no clear-cut idea of what they are supposed to do. In one case, a curriculum developer says she has a supervisor downtown that she has never met or even talked to.

This is the control the courts have given to Eugene Eubanks, who answers to no one and has the full support of the courts. This is the control the courts have given to one man who stated, "I plan to be in Rockford as little as possible. I might try to come into this city once per week to monitor the deseg program." This is the man who has given School District 205 a $25 million budget proposal and said, "raise your tax levy another 9.13 percent. I do not care where the money comes from, just get it. I do not care about the amount of tax levy needed." He is saying that the school board and community should just learn to take his orders and follow.

With such large sums of money involved, corruption and administrative bureaucracy abound. One memorable example in Rockford of the corrosive effect of this judicial tyranny was the hiring in 1993 of Stephen J. Wesley as Associate Superintendent of Equity.

Thirteen months later, it was discovered that Mr. Wesley had been convicted of embezzling money in another school district and had claimed on his resume a number of phony degrees, including a doctorate and a master's. Mr. Wesley was not chosen by the superintendent nor approved by the school board but by a Planning and Implementation Committee, PIC, led by a Federal court-appointed master of desegregation, Eugene Eubanks.

On the recommendation of the present superintendent and with the warning of the school district's attorneys that we will be showing non-compliance and bad faith, the Rockford School Board is allowing funding for these court orders through tort. This funding source is being challenged by the people of Rockford in the Seventh Circuit Appellate Court. I need to add at this time, on Monday, the Seventh Circuit Appellate Court ruled that the tort funds should be remanded back to State jurisdiction and not Federal jurisdiction. Also, yesterday, I would like to add that Magistrate Judge P. Michael Mahoney ordered a $23.5 million tax from the tort fund. So, in essence, he has done what we thought he would do.

My hope is that the courts find that this is an improper use of the tort fund. Board members are being forced to give depositions and hire personal attorneys to protect themselves from intimidation and harassment, because the attorney for the plaintiffs believes that we have become an unruly mob that is plotting to ignore the court orders.

I can say for myself, and I believe my fellow board members would agree, to deliberately segregate a school is wrong. Every attempt should be made to provide our children with the tools they will need to move into the 21st century, to be productive, well-equipped members of society. We are non-paid, elected volunteers who are willing to stand up for children's rights and the rights of a community to provide our children with the tools they need to accomplish their goals.

An air of sadness, despair, and cynicism prevails in the Rockford community. It has been created by a total dominance of the magistrate and the master in this desegregation suit. An air of futility says to us all, "we play, you pay."

Senator GRASSLEY. Mr. Neblock, are you about done?

Mr. NEBLOCK. I have two more sentences, sir.

Senator GRASSLEY. I am sorry I interrupted you, then. While you are stopped, let me explain. I hope that we can get each witness within five or just running over a little bit when the red light comes on at five minutes. Go ahead.

Mr. NEBLOCK. I was so nervous, sir, I did not even look up.

I come here today to solicit your support, support in giving back to a fine Rockford community a ray of hope, a glimmer of light, an opportunity to move forward in providing academic excellence for all the children in District 205.

Senator GRASSLEY. Thank you very much.

We are going to hold questions for each of you until we get done.

Mr. Lindseth.

STATEMENT OF ALFRED A. LINDSETH

Mr. LINDSETH. Thank you, Mr. Chairman, Senator Heflin. It is both an honor and a pleasure to appear before the committee today.

I grew up in the Midwest, I went to school in the East, and I moved to Atlanta, the South, in 1973, so I have been around the country. Like many transplanted Northerners to the South, I was fairly unfamiliar with the desegregation process when I arrived and my first contact with it was through my children, who went to Atlanta's public schools.

For the last 20 years, I have represented major school districts in States across the country in connection with this process. For example, I have been heavily involved with the process in Kansas City, St. Louis, Los Angeles, Charleston, SC, Hartford, CT, Knoxville, TN, a number of school districts in Georgia, including DeKalb County, Savannah, and others. So I have seen this process from about every point of view that you can imagine and I want today to share with you some of my observations and concerns about the judicial process as it applies to the school area.

First, I want to talk about the almost unbelievable discretion that Federal judges have to craft remedies which require State and local school systems to make huge expenditures and often necessitate court-ordered tax increases. Let me illustrate.

In 1992, a Federal judge found the State of Georgia liable for segregation in the Savannah-Chatham County School District, ordered the State to pay 15 percent of the costs. That was approximately $10 million. The court's rationale, and this was in their discretion that the State was responsible for 15 percent of the problem. Georgia, as did some States, particularly in the South, had not fully desegregated in the years after *Brown* and it had taken some time.

Now, contrast what happened in Georgia with what happened in Missouri with the Kansas City and St. Louis case. In that case, the State of Missouri was ordered to pay 50 to 100 percent of the costs for those two school systems, which are only slightly larger than Savannah. Those remedies to date have cost the State about $2.6 billion and the districts themselves another $1 billion or so, and that is just the remedy, the desegregation remedies.

I dare say that no one could explain to me what distinguishes the facts of those two cases which would require the payment of $2 to $4 billion in Missouri but only $10 million in Georgia. Certainly, Missouri's conduct was not worse than that of Georgia, and I do not think anybody would seriously argue that the remedial needs in Kansas City and St. Louis are 200 to 300 times what they are in Savannah, GA.

My point is that these disparate outcomes can only be explained by one thing, and that is the attitude of the individual Federal district judge, the feelings that he or she brings to the cases and the extremely broad discretion that they have to order zero, $10 million, or $3.6 billion.

Let me put this amount in some perspective, and it will illustrate the discretion I am talking about. From 1989 to 1994, five years, when Missouri was spending during that period about $1.4 billion, the other 48 States combined, not counting California, spent about

the same as Missouri did. I think that will give you some idea. The 11 States of the South spent about $172 million, of the deep South, compared to Missouri's $2.6 billion by the State.

Let me move on to another problem. The problem is not only the huge amount that can be ordered but it is exacerbated by the difficulty in ending court jurisdiction. These cases can go on for many years. Topeka, the subject of *Brown* v. *Board of Education,* is still under court supervision, 42 years after that decision.

And there is a problem. Once you order massive court-ordered funding, sometimes the school districts themselves become dependent on it. That is what happened in Kansas City and the school district itself has been fighting getting out from under the court order. Just to give you an idea, these districts in St. Louis and Kansas City currently spend over $8,000 per child while the rest of the State spends about $4,500. In the past few years, it has gotten as high as $13,000 per child in Kansas City as a result of these tax increases and court-ordered spending.

Let me talk for a minute about ending court supervision, because it is not only the amount, it is how long you remain under these court orders. I will talk specifically about the practice of some Federal judges of appointing special masters or desegregation committees to deal with this subject.

They have enormous power, and the problem is that they are answerable to almost no one except for the Federal judge. They have easy access to the Federal judge. They can come and go. They can give their opinions. They are not subject to any cross examination. You cannot take discovery from them, like any other expert witness. Not only that, I think they generally come from the plaintiff's viewpoint. In fact, in Kansas City, the special master was an expert for the Kansas City School District, which was a proponent of this remedy and aligned with the plaintiffs in trying to get these tax increases.

They also have a financial incentive, and this is no small matter. In St. Louis, $28 million has been paid by the State and districts to these masters and special desegregation committees. Some of them have budgets of $1 million a year. So obviously, if the case ends, so does the role of the committee or so does its budget. So it comes as no surprise that in St. Louis, when we went to court to try to get them out from under court jurisdiction, that the heads of the most important committees said, "No. It is not time."

My time is up, Senator. I would be happy to answer any questions when the time comes.

[The prepared statement of Mr. Lindseth follows:]

PREPARED STATEMENT OF ALFRED A. LINDSETH

SUMMARY

Mr. Lindseth has been deeply involved in the school desegregation process over the last 20 years, as it has been carried out by the federal courts. He will offer testimony regarding the impartiality, fairness and uniformity of the judicial process as it relates to school desegregation. Specifically, he will address the following problems:

1. Virtually unlimited discretion in federal judges. Often based on vague and ambiguous findings of liability, a federal judge may order states and school districts to provide extensive and costly desegregation programs, including massive bureaucracies to administer such programs, and may order the necessary tax increases to

pay for such programs. As a result of this wide discretion, some states, such as Missouri, and school districts have been ordered to pay enormous amounts for desegregation, while others have paid little or nothing for desegregation. For example, Missouri has paid approximately $2.6 billion to date for school desegregation, while other states which also had state-mandated separate school systems for the races prior to the 1954 *Brown* decision have paid little or nothing. The principal determining factors are not the facts of the particular cases, but the manner in which the particular judge chooses to exercise the enormous discretion vested in him or her.

2. Aspects of the judicial process which make it very difficult for a school district or state to end court supervision, despite the Supreme Court's ruling that desegregation remedies are meant to be temporary in nature. These include (a) legal rules which presume that the cause of all racial disparities in a school system is the pre-1954 dual school system, even though legal segregation ended 25 to 40 years ago, and (b) the appointment in some cases of special masters, desegregation committees or panels of experts who are often aligned with the interests of the plaintiffs and have personal financial incentives to indefinitely continue remedial measures.

As a result, the level of local and state taxes, the degree of control left in the local elected officials, the length of time (*e.g.,* five or forty years) the school district or state will remain under court supervision and the manner in which the schools are desegregated are all left to the discretion of the federal judge assigned to the case, with some limited right of appeal. However, the attitude of the district judge about desegregation is, as a practical matter, much more important than the evidence in the particular case.

Senator Grassley, and members of the Committee:

I. INTRODUCTION AND BACKGROUND

It is my pleasure to appear before you today to present my views on the subject of "Assessing the Impact of Judicial Taxation on Local Communities." Before I start, let me tell you something about myself and my experience with the subject before the Committee. I grew up in North Dakota, and then went to West Point. After military service, I went to law school at Harvard. I graduated in 1973, and moved to Atlanta, where I joined the law firm of Sutherland, Asbill & Brennan. I have practiced law with Sutherland since 1973. Like many transplanted northerners, I was unfamiliar with the desegregation process when I move to the South. My first involvement came through my children who attended Atlanta's public schools. I became professionally interested in the subject in the mid-1970s and for the last 20 years, I have represented major urban school districts and states across the country that have come under court order to desegregate their public schools, and have observed firsthand the operation of the federal courts in the supervision of local and state educational institutions. Over the years, I have been heavily involved with the desegregation process in such cities as Kansas City and St. Louis, Missouri, Los Angeles, California, Charleston, S.C., Hartford, Connecticut, Knoxville, Tennessee, Savannah, and DeKalb County, Georgia, as well as numerous other smaller school districts. I have participated in the design and implementation of desegregation plans. I have been involved in many trials involving issues of school district liability, appropriate remedies and funding of desegregation remedies. I have also represented several school districts in their effort to become "unitary" or to end court supervision and know the difficult burden a school district faces in bringing an end to court supervision and returning control of the district to local elected officials.

Probably of most interest to the Committee will be the Missouri school cases, where I am currently acting as outside counsel for the State of Missouri in its efforts to wind down the enormous State subsidies which have been ordered by the federal courts in connection with desegregation remedies in St. Louis and Kansas City—approximately $2.6 billion so far. I have also recently been asked by the Rockford, Illinois Board of Education to assess the situation in that District and recommend a course of action for the future. In the last few years, I have also represented several states in cases brought seeking broad based remedies under State constitutional provisions, as plaintiffs' groups shift their efforts more and more to the state courts.[1]

II. ISSUES ADDRESSED

I would like to address today my concerns over certain aspects of the judicial process that I think raise doubts in the minds of many over its impartiality, fairness

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Footnotes are at end of article.

and uniformity of application, particularly in the important and often controversial area of school desegregation.

A. As a practical matter, federal judges have exercised virtually unlimited discretion when it comes to school desegregation. Often based on vague and ambiguous findings of liability, a federal judge may order states and school districts to provide extensive and costly desegregation programs and the administrative structures to support such programs. In addition, the court may order school districts to raise local property taxes to pay for such programs. As a result of the broad discretion vested in the federal courts, some states and school districts have been ordered to pay billions of dollars for desegregation, while many other states and school districts have gotten off literally scott free. The problem with this scenario is that the principal determining factor seems not to be the facts of the case, but the manner in which the particular judge chooses to exercise his or her discretion.

B. Several factors, including the breadth of discretion vested in individual federal judges, make it very difficult for a school district or state to end court supervision, despite the Supreme Court's ruling that desegregation remedies are meant to be temporary in nature. One such factor is the appointment in many cases of special masters, panels of experts or desegregation monitoring committees who are aligned with the interests of the plaintiffs and have inherent incentives to continue indefinite remedial measures.

There is no question that federal judges have very broad powers in the area of school desegregation. No one would seriously disagree that they must have some discretion to deal with situations specific to a particular school district. However, their discretion is so broad that, depending on the frame of mind of the particular federal judge, some districts and states can minimize federal intervention into their affairs, while others are subjected to an almost total takeover of local and state educational institutions, including massive court-ordered spending for desegregation. As a result, the level of local and state taxes, the degree of control left in the local elected officials, the length of time the school district or state will remain under court supervision, *e.g.,* five years or forty years, and the manner in which the schools are desegregated are essentially left to the discretion of one person—the federal judge assigned to the case. This is particularly true where the circuit court of appeals is of like mind with the district court, as has been the case in Missouri. Consequently, the Judge's attitudes about desegregation become much more important than the evidence in a particular case.

III. DISCUSSION

A. Judicial taxation to pay for court-ordered injunctions

Let me talk first about "Judicial Taxation." I use this term to refer to federal court orders that require a local or state governmental entity to make significant expenditures in support of a court-ordered injunction, such as an injunction requiring a local school district and/or state to implement and fund a desegregation remedy. In some cases, these orders overturn state law limits which would otherwise limit local tax levies.[2] Once a federal court has found a constitutional violation, it has broad discretion over the type of plan ordered, the length of the plan, how the plan is funded and how the funding is allocated between different constitutional wrongdoers.

There is case law which purports to limit a court's discretion. Generally, the remedy must be tailored to fit the violation.[3] In *Missouri* v. *Jenkins,* the Court further limited the federal courts' discretion in connection with cross-district remedies, "educational vestiges" and the "victims" which may be served by the remedy.[4] However, in practice these limits provide little protection to a school district or state if a federal judge wants to impose or continue an extensive remedy. As a result, the remedies imposed vary greatly from court to court, and from state to state. These variations cannot be explained by the differences in either the acts that gave rise to liability in the first place or the remedial necessities of particular school districts. In my opinion, they can only be explained by the particular views of the federal judge hearing the case. Let me give some examples. In 1992, a federal judge found the State of Georgia liable for segregation in the Savannah-Chatham County School District, and ordered the State to pay 15% of the desegregation costs incurred in desegregating the Savannah, Georgia, School District—approximately $10 million.[5] The court's rationale was that the State was responsible for 15% of the vestiges of segregation still remaining in Savannah's schools.[6] Georgia, as did most deep South states, had actively resisted desegregation for at least 15 years after the Supreme Court's landmark *Brown* v. *Board of Education* decision, had enacted numerous state laws during those years to thwart desegregation and had not spent anything to encourage desegregation.[7] But contrast the *Savannah* decision with the decisions

in the *Kansas City* and *St. Louis* cases in which the State of Missouri was ordered to pay 50% to 100% of the costs of desegregating those two school districts (which are only slightly larger than the Savannah-Chatham County School District). These remedies have to date cost the State approximately $2.6 billion. Yet the evidence in the Missouri cases showed little state resistance to the ending of the dual school system, compared to Georgia and other southern states. Within a year of the 1954 *Brown* decision the Attorney General of Missouri had notified local schools that the state-mandated system of separate schools for the races was no longer enforceable.[8]

I doubt that anyone can explain which distinctions between the *Georgia* and *Missouri* cases justify a judicial order requiring the payment of $2.6 billion by Missouri, but only $10 million by Georgia.[9] Certainly Missouri's conduct was not worse than that of Georgia. No one would seriously argue that the remedial needs in St. Louis or Kansas City were over 200 times greater than in Savannah, Georgia. These disparities can only be explained by reference to the broad discretion that federal judges have in not only finding liability, but then in formulating a remedy. No one can know whether a state's actions were responsible for 15% or 50% or 100% of the so-called vestiges of segregation; therefore, it is left up to the individual federal judge to pick a number. After that, the nature, extent, expense, and funding of the remedy is up to the same judge. Thus, while Congress has acted to limit the discretion of federal judges in some areas (*e.g.*, in the sentencing of convicted criminals), there are no practical limits preventing such broad discretion when it comes to ordering desegregation remedies or determining who should pay for such remedies.

As I mentioned, through the 1995–96 school year, Missouri had paid approximately $2.6 billion on desegregation remedies for St. Louis and Kansas City.[10] Let me put this amount in context for you. From 1989 to 1994, the other 48 states combined (excluding California) spent only $1.42 billion.[11] Missouri spent about $1.34 billion during this same five-year period, approximately the same amount as the 48 other states put together. If one looks at the eleven states of the old Confederacy during the same period, all of which ad state-mandated dual school systems, prior to 1954 and vigorously resisted efforts to desegregate, Missouri has been ordered to spend almost eight times the $172 million paid by those eleven states from 1989 to 1994.[12] Only California, with more than ten times as many students affected by desegregation spending as Missouri, had spent as much as Missouri.[13] However, in California, the spending was approved by the California legislature. In Missouri, the spending, which benefitted less than 10% of the state's student population, was ordered by the federal courts.

B. Factors which make it difficult for a school district or State to end court supervision and regain local control

The Supreme Court has held that local control of schools "is a vital national tradition."[14] The Court has also, in *Freeman* v. *Pitts,* held that the ultimate goals of the federal courts should be to eliminate the vestiges of the *de jure* school system to the extent practical *and* to strive to return education to local control at the earliest practical date.[15] In *Jenkins* v. *Missouri,* decided in 1995, the Supreme Court reiterated that desegregation remedies are intended to be temporary in nature and not permanent.[16] However, although some school districts have been successful in ending court supervision,[17] the process is stacked against both school districts and, especially, states. Therefore, spending to support court-ordered injunctions may continue for years after the dual school system has been eliminated. Let me describe some of the obstacles a state or local school district faces in trying to end court-ordered supervision.

1. When massive court-ordered funding is ordered, the local school district becomes so dependent on funding that the school district itself may insist that it is not unitary, but should remain under court order so that extraordinary funding can continue. As a consequence, the local electorate is denied the protection against tax increases normally offered by state law limits on tax rates. Moreover, if the expense is being borne state-wide, it is not fair to the other school districts in the state which do not benefit from such spending. The prime examples are St. Louis and Kansas City. By virtue of state desegregation funding, these districts currently spend over $8,000 per child per year while other school districts in Missouri average about $4,500 per child per year.[18] They are able to offer programs and other advantages, such as small classes, not available in other districts. For example, the St. Louis and Kansas City Districts offer over seventy-five expensive magnet programs between them compared to few, if any, such programs in the rest of Missouri. It is not surprising that these school districts want to retain these benefits, since the principal cost is borne by the state. They therefore have become willing participants with the plaintiffs in resisting unitary status. Thus, the state taxpayers, who are paying the bill, are put in the difficult position of having to prove that the school

districts have eliminated the vestiges of the dual school system, while the school districts themselves fight to remain under court control so state funding can continue.

Moreover, after a school district has gotten used to additional funding, and has built a bureaucracy, physical plant and programs dependent on continued court-ordered funding, it becomes a practical problem to end or even phase out the remedy, even if the remedy is clearly beyond that court's jurisdiction to order. In 1995, the Supreme Court ruled in the Kansas City case that a federal court could not order an interdistrict remedy based only on an intradistrict violation.[19] However, in St. Louis the State is spending approximately $100 million per year to support a purely interdistrict remedy based only upon an intradistrict violation.[20] Since the Supreme Court's decision, the State has sought to end funding for the interdistrict aspects of the St. Louis remedy, but has not yet been allowed to end such funding. Moreover, there is no end in sight, as the district judge has deferred any decision on the State's motions to end the remedy while a settlement coordinator tries to bring about a settlement of the case. In the meantime, the State has been ordered to continue to pay for a remedy that the Supreme Court has clearly indicated is beyond the power of the federal courts to order, at the rate of approximately $2 million per week. This illustrates the difficulty of terminating a remedy even when the courts themselves recognize it is beyond their power to order.

2. Even where the school district itself wants to end court supervision, it may find itself unable to do so as a practical matter because it has grown dependent on tax increases which, but for the court order, would exceed permissible limits under state law. In Kansas City, the court ordered a special property tax levy which, together with State payments, pays for the desegregation remedy. A newly elected school board in 1995, which might itself prefer to seek an end to court supervision, now finds itself in the position of not being able to end court supervision without at the same time risking an end to its special local levy on which it has become financially dependent.

3. Other forces are lined up against a state or school district seeking to end judicial supervision. Today, over 40 years after *Brown* declared state-mandated dual school systems, unlawful, plaintiffs still claim the advantage of a judicial presumption that any racial disparities in the school system are the result of the former *de jure* school system. The burden is then shifted to the school district or state to prove that this is not the case.[21] While this burden shifting may have been justified in the years following the *Brown* decision, three or four generations of students have passed through our public schools since *Brown* was decided and the rationale behind the presumption seems of questionable validity today.[22] Nevertheless, the presumption against the school district remains and it has the burden to prove that racial disparities are not the result of the prior *de jure* school system. This is the opposite of the normal case where the plaintiffs have the burden of proving their case. Since the causes of many of the racial disparities one finds in today's public school systems are difficult to ascertain, this shifting of the burden of proof is a considerable advantage for those who wish to retain federal court control of the school system. This is particularly true if they have a federal judge who is of the same mindset since it is that judge who will decide whether the school district or state has carried its burden of proof.

C. The appointment of special masters and other desegregation committees

The practice of some federal judges of appointing special masters, desegregation committees or panels of experts to formulate, monitor, and implement the remedies ordered by them is another development that militates against release from court supervision. In many cases, these masters and committees wield enormous power and influence. They are normally answerable to no one, save the federal judge who appointed them, and have become a part of the judicial process which is stacked against a district or state seeking a return to local control. Let me explain what I mean.

1. The power and authority of these special masters is extraordinary. In some cases, with the support of the judge, special masters literally supplant the authority of the school board. In Kansas City a new board was elected in 1996. Reacting to the admonitions of both the district judge and Supreme Court that the District move toward self-sufficiency,[23] the new school board adopted a budget that reduced by a significant amount the special state subsidy. After a hearing, the district judge, despite his earlier inducements to the board to become more self-supporitng, restored many of the budget cuts the Board had made.[24] There were a number of schools for which the budget cuts were not challenged at trail; therefore, the State and the District argued that those budget cuts were unchallenged and should stand. Notwithstanding the lack of any challenge to the budget cuts at those schools, the District Judge referred the issue of whether the cuts should be restored at those other

schools to the Education Subcommittee ("ESC") of the Desegregation Monitoring Committee appointed by him.[25] In a hearing in which the State was not allowed to participate, the ESC restored the budget cuts at virtually every school and ordered the State to pay 75% of the restoration costs. Going even further, the ESC decided to investigate other budget cuts to see if they should be restored, despite the fact that all of the parties, including the plaintiffs, had stipulated to those cuts and such stipulation had been approved by the court.

Rockford, Illinois is another example of a Master possessing great powers. Almost 400 personnel have been hired or are budgeted to be hired to administer and implement the desegregation plan ordered by the Magistrate Judge assigned to the case. This includes a number of highly paid administrators, most of whom report directly to the Master. On almost every aspect of the remedial order, the decision of the Master is final, subject only to the right of the School Board to appeal it to the Court. However, during the pendency of the appeal, the School Board is bound by the Master's order.[26]

2. Although it varies from case to case, masters or desegregation committees often have easy access to the judge, and can meet with the judge without the presence of other parties. Thus, they can convey to the court their opinions about matters of great controversy, without fear of rebuttal, while the parties must present their evidence and arguments in open court where they are subject to being challenged by the other parties. In many cases, the master is not subject to cross-examination, as are the experts of the other party. This would not necessarily be a bad thing if the parties could be assured of the impartiality of the master. However, such masters are almost always aligned with the proponents of continued court supervision. For example, the head of the Desegregation Monitoring Committee in the *Kansas City* case was a former expert witness for an superintendent of the school district, which, until 1996, had been consistently aligned with the plaintiffs in seeking to continue the remedy. The same person serves as the Master in the *Rockford* case. In other cases, the panels of experts normally appointed invariably include, with few exceptions, experts who normally testify for plaintiffs. Imagine how plaintiffs groups would respond if a court appointed a defense expert witness to be the special master.

3. The natural bias of most special masters toward the plaintiffs' point of view is exacerbated by the inherent self interest which special masters have in seeing to it that the remedies continue. If the school district is declared unitary and the remedies end, they (and all their staff) are out of a job. This is no trivial matter. The financial stakes are heavy. For example, in St. Louis, from 1980 to 1995 approximately $28 million was paid to various desegregation committees.[27] Over $11 million alone (almost $1 million per year) was paid to the voluntary interdistrict coordinating committee, which oversees the voluntary interdistrict transfer plan, a part of the plan almost certainly illegal under *Missouri* v. *Jenkins*.[28] The Master's budget in Rockford is over $400,000 per year (not including the 397 persons budgeted to administer and implement the remedy which are anticipated to cost approximately $25 million per year).

Thus, it came as no surprise in St. Louis when the heads of the most important desegregation committee lined up with the plaintiffs in resisting an end to court supervision in that case. They were permitted to submit evidence on critical issues at the unitary trial. However, defendants were not permitted to take discovery against them or to cross-examine them. Thus, while the testimony and opinions of the parties' witnesses could be discovered in advance of trial and tested through a thorough and sifting cross-examination, the testimony of those witnesses with perhaps the greatest personal stake in seeing the remedy continue were exempt from these basic due process protections.

The courts themselves have begun to recognize the inherent conflict of interest and problems related to the appointment of special masters, panels of experts, etc. In *Edgar* v. *KL*,[29] the Seventh Circuit Court of Appeals removed a federal judge from a case because he had held *ex parte* meetings with a panel of experts appointed by the Judge to investigate Illinois' mental health institutions. However, as far as I know, this has never happened in a school desegregation case.

IV. CONCLUSION

I hope my testimony is of some assistance to the Committee in defining the scope and the nature of these difficult problems, and that these hearings will spur action to devise solutions. It is essential that ordinary people view judicial processes as fair, unbiased and uniform in their application, particularly when it comes to such controversial topics as school desegregation. I have talked today about some areas of our legal system which I think need to be improved. Obviously, because of the

doctrine of separation of powers on which our Constitution is based, legislative solutions that seek to curtail the discretion of the federal judiciary will be difficult to formulate and will be closely scrutinized by the courts. I hope this difficulty will not deter anyone from this necessary effort. I would be interested in assisting you to come up with possible ways to address the problems I have described.

FOOTNOTES

1. The views I express today are my own gained from years of involvement in the school desegregation process, and not necessarily the views of any of my clients. Nor am I here to advocate the views of any particular group. I am also not here to testify about the general subject of desegregation. There is no question in my mind and in the mind of most Americans that *de jure* segregation was wrong and that it had to be ended. There is considerable debate still going on as to how effective and stable desegregation of the schools should be accomplished; however, as I have often told people, the debate is not whether to desegregate, but how to do it?

2. *E.g.*, *Missouri* v. *Jenkins,* 495 U.S. 33 (1990).

3. *E.g.*, *Milliken* v. *Bradley,* 433 U.S. 267, 280–281 (1977).

4. *Missouri* v. *Jenkins,* 115 S. Ct. 2038 (1995).

5. *Board of Pub. Educ. for the City of Savannah & County of Chatham* v. *State of Georgia,* No. CV 490–101 (S.D. Ga. Aug. 11, 1992).

6. *Id.*

7. *Id.*

8. *See Missouri* v. *Jenkins,* 115 S. Ct. 2038, 2052 n.6 (1995).

9. *See* Attachment 1. (This attachment was an exhibit prepared by Dr. Christine Rossell, one of the State of Missouri's expert witnesses, in connection with the March 1996 unitary hearing in the St. Louis school case.)

10. *See* Attachments 2 and 3. (These attachments were prepared by the Missouri Department of Elementary and Secondary Education in connection with hearings in the St. Louis and Kansas City school cases and show the State and local district expenditures for desegregation in each case.)

11. *See* Attachment 1.

12. *Id.* Indeed, of the eleven states, ten had paid nothing through 1994. Arkansas was the only one which had actually paid anything to assist in desegregation. As discussed, since 1994, Georgia has also paid approximately $10 million.

13. *Id.*

14. *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406, 410 (1977).

15. *Freeman* v. *Pitts,* 503 U.S. 467, 490 (1992).

16. *Missouri* v. *Jenkins* 115 S. Ct. 2038 (1995).

17. *E.g.,* Atlanta, Georgia, Savannah-Chatham County, Georgia, DeKalb County, Georgia, Charleston, South Carolina, Knoxville, Tennessee, Norfolk, Virginia, Oklahoma City, Oklahoma, Wilmington, Delaware, Dallas, Texas (conditional).

18. *See* Attachment 4. (This attachment consists of exhibits prepared by the Missouri Department of Elementary and Secondary Education in connection with hearings in the *Kansas City* and *St. Louis* school cases).

19. *Missouri* v. *Jenkins,* 115 S. Ct. 2038 (1995).

20. The interdistrict remedy in St. Louis has been in place since 1983, and the State had paid almost $1 billion through the 1995–96 school year to support it. See Attachment 2.

21. *E.g., Keyes* v. *School Dist. No. 1,* 413 U.S. 189, 211 n. 17 (1973).

22. In *Freeman* v. *Pitts,* 503 U.S. at 506, Justice Scalia, in a concurring opinion, stated: "At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools."

23. *Missouri* v. *Jenkins,* 115 S. Ct. 2038, 2055 (1995); *Jenkins* v. *Missouri,* No. 77–0420–CV–W–4, slip op. at 13 (W.D. Mo. Apr. 16, 1993).

24. *Jenkins* v. *Missouri,* No 77–0420–CV–W–4 (W.D. Mo. July 15, 1996).

25. *Id.*

26. *People Who Care, et al.* v. *Rockford Bd. of Educ. Sch. Dist. No. 205,* No. 89 C 20168 (W.D. Ill. 1996).

27. *See* Attachment 5. (This attachment was prepared by the Missouri Department of Secondary and Elementary Education for the March 1996 unitary status hearing in the *St. Louis* case).
28. *Id.*
29. *Edgar* v. *K.L.,* No. 96–2641, 1996 WL 405386 (7th Cir. July 18, 1996).

Appendix 5

ATTACHMENT 1 STATE FUNDING FOR DESEGREGATION, 1989–1990 THROUGH 1993–94

STATE	Source Deseg Funding Decision	Per Affected Pupil Expend.	Total Deseg. $ as % Total $	1992–93* Total State Expend. (millions)	1993–94 Total State Enroll.	1989–94 Total 5 Yr. Deseg. Funding**	1993–94 Number Students Affected	STATE DESEGREGATION EXPENDITURES 93–94	92–93	91–92	90–91	89–90
Alabama		$0	0%	$9,993	722,933	$0	0	$0	$0	$0	$0	$0
Alaska		$0	0%	$4,327	130,556	$0	0	$0	$0	$0	$0	$0
Arizona		$0	0%	$8,132	762,863	$0	0	$0	$0	$0	$0	$0
Arkansas	Court	$729.9	0.542%	$6,369	443,023	$172,656,364	47,311	$35,633,871	$33,868,377	$35,728,845	$34,394,262	$33,031,009
California	Voluntary	$306.9	0.581%	$86,061	5,267,277	$2,498,642,084	1,628,492	$496,093,271	$503,823,526	$531,973,935	$489,817,671	$476,933,681
Colorado		$0	0%	$6,641	630,668	$0	0	$0	$0	$0	$0	$0
Connecticut	Voluntary	$31.3	0.038%	$12,077	493,205	$22,987,000	146,950	$14,336,000	$3,469,000	$2,504,000	$1,639,000	$1,039,000
Delaware	Court	$2.5	0.005%	$2,828	105,547	$695,000	55,094	$139,000	$139,000	$139,000	$139,000	$139,000
Florida		$0	0%	$34,378	2,005,106	$0	0	$0	$0	$0	$0	$0
Georgia		$0	0%	$14,715	1,258,089	$0	0	$0	$0	$0	$0	$0
Hawaii		$0	0%	$6,238	179,876	$0	0	$0	$0	$0	$0	$0
Idaho		$0	0%	$2,349	240,649	$0	0	$0	$0	$0	$0	$0
Illinois		$0	0%	$23,101	1,893,077	$0	0	$0	$0	$0	$0	$0
Indiana	Court	$133.0	0.119%	$11,417	960,434	$68,062,427	102,320	$14,081,183	$12,442,175	$13,912,058	$13,844,327	$13,782,684
Iowa		$0	0%	$8,085	494,539	$0	0	$0	$0	$0	$0	$0
Kansas		$0	0%	$5,934	457,614	$0	0	$0	$0	$0	$0	$0
Kentucky		$0	0%	$10,152	631,976	$0	0	$0	$0	$0	$0	$0
Louisiana		$0	0%	$12,516	771,149	$0	0	$0	$0	$0	$0	$0
Maine		$0	0%	$3,545	226,032	$0	0	$0	$0	$0	$0	$0
Maryland		$0	0%	$12,086	772,638	$0	0	$0	$0	$0	$0	$0
Massachusetts	Voluntary	$64.4	0.130%	$16,184	879,663	$104,830,890	325,502	$30,845,823	$22,021,641	$17,151,635	$17,071,104	$17,740,687
Michigan	Court	$423.2	0.019%	$20,824	1,517,924	$19,957,249	9,431	$3,691,997	$4,290,902	$3,991,450	$3,991,450	$3,991,450
Minnesota	Voluntary	$170.0	0.141%	$11,900	803,903	$84,020,000	98,869	$20,444,000	$15,844,000	$15,844,000	$15,944,000	$15,944,000
Mississippi		$0	0%	$5,414	503,374	$0	0	$0	$0	$0	$0	$0
Missouri	Court	$1,717.3	2.810%	$9,543	852,788	$1,340,674,969	156,137	$278,138,182	$260,662,146	$297,600,185	$273,773,258	$230,501,198
Montana		$0	0%	$2,248	162,526	$0	0	$0	$0	$0	$0	$0
Nebraska		$0	0%	$3,676	327,687	$0	0	$0	$0	$0	$0	$0
Nevada		$0	0%	$3,826	250,747	$0	0	$0	$0	$0	$0	$0
New Hampshire		$0	0%	$2,179	182,363	$0	0	$0	$0	$0	$0	$0
New Jersey	Voluntary	$62.4	0.038%	$21,593	1,151,610	$40,956,740	131,301	$13,739,740	$13,570,000	$13,647,000	$0	$0
New Mexico		$0	0.000%	$4,039	321,183	$0	0	$0	$0	$0	$0	$0
New York	Voluntary	$41.0	0.129%	$54,796	2,698,954	$354,181,868	1,726,441	$86,706,000	$75,771,026	$76,538,903	$61,689,415	$53,476,524

Appendix 5

STATE FUNDING FOR DESEGREGATION, 1989–1990 THROUGH 1993–94

STATE	Source Deseg Funding Decision	Per Affected Pupil Expend.	Total Deseg. $ as % Total $	1992–93* Total State Expend. (millions)	1993–94 Total State Enroll.	1989–94 Total 5 Yr. Deseg. Funding**	1993–94 Number Students Affected	STATE DESEGREGATION EXPENDITURES 93–94	92–93	91–92	90–91	89–90
North Carolina		$0	0%	$15,272	1,123,568	$0	0	$0	$0	$0	$0	$0
North Dakota		$0	0%	$1,674	118,649	$0	0	$0	$0	$0	$0	$0
Ohio	Court	$175.8	0.156%	$25,854	1,822,288	$202,130,869	229,929	$47,580,295	$40,755,594	$34,540,404	$36,221,327	$43,033,249
Oklahoma		$0	0%	$7,268	604,155	$0	0	$0	$0	$0	$0	$0
Oregon		$0	0%	$9,041	521,945	$0	0	$0	$0	$0	$0	$0
Pennsylvania		$0	0%	$27,113	1,744,082	$0	0	$0	$0	$0	$0	$0
Rhode Island	Voluntary	$0.1	0%	$3,383	144,932	$21,000	31,933	$10,500	$10,500	$0	$0	$0
South Carolina		$0	0%	$8,957	658,534	$0	0	$0	$0	$0	$0	$0
South Dakota		$0	0%	$1,470	135,267	$0	0	$0	$0	$0	$0	$0
Tennessee		$0	0%	$10,044	864,272	$0	0	$0	$0	$0	$0	$0
Texas		$0	0%	$33,556	3,608,262	$0	0	$0	$0	$0	$0	$0
Utah		$0	0%	$4,039	468,675	$0	0	$0	$0	$0	$0	$0
Vermont		$0	0%	$1,493	102,755	$0	0	$0	$0	$0	$0	$0
Virginia		$0	0%	$14,102	1,042,285	$0	0	$0	$0	$0	$0	$0
Washington	Voluntary	$67.9	0.057%	$13,683	915,952	$39,042,999	115,036	$14,894,865	$5,991,665	$7,638,485	$1,500,000	$9,017,984
West Virginia		$0	0%	$5,073	313,750	$0	0	$0	$0	$0	$0	$0
Wisconsin	Voluntary	$291.3	0.478%	$13,323	844,001	$318,644,711	218,771	$75,289,917	$69,604,339	$65,601,810	$57,644,509	$50,504,136
Wyoming		$0	0%	$1,777	100,929	$0	0	$0	$0	$0	$0	$0
Total		$209.7	0.166%	$634,288	43,234,274	$5,267,504,170	5,023,517	$1,131,624,644	$1,062,263,891	$1,116,811,710	$1,007,669,323	$949,134,602
Total w/o MO.		$161.4	0.126%	$624,745	42,381,486	$3,926,829,201	4,867,380	$853,486,462	$801,601,745	$819,211,525	$733,896,065	$718,633,404
Average		$84.3	0.105%	$12,686	864,685	$105,350,083	100,470	$22,632,493	$21,245,278	$22,336,234	$20,153,386	$18,982,692
Avg. w/o MO.		$51.0	0.050%	$12,750	864,928	$80,139,371	99,334	$17,418,091	$16,359,219	$16,718,603	$14,977,471	$14,665,988
Avg. Deseg. States w/o Mo.		$178.6	0.174%	$21,449	1,289,194	$280,487,800	347,670	$60,963,319	$57,257,268	$58,515,109	$52,421,148	$51,330,957
Total Deseg. States w/o Mo.		$161.4	0.262%	$300,292	18,048,713	$3,926,829,201	4,867,380	$853,486,462	$801,601,745	$819,211,525	$733,896,065	$718,633,404
Missouri		$1,717.3	2.810%	$9,543	852,788	$1,340,674,969	156,137	$278,138,182	$260,662,146	$297,600,185	$273,773,258	$230,501,198

* Nevada total state expenditures are for the 1991–92 fiscal year.

** Desegregation expenditures do not include intradistrict transportation.

ATTACHMENT 2

TOTAL FUNDING OF DESEGREGATION MEASURES BY THE STATE

Fiscal Year	Magnet Plan	Quality Education Plan	Part-Time Programs	VIDT Funding	Capital Funding	Interdistrict Plan	Committee/ Misc.	Totals
1981	0	0	0		0	8,530,000	0	8,530,000
1982	0	0	0	157,327	0	8,624,435	0	8,781,762
1983	0	0	0	4,398,164	0	8,130,269	502,940	13,031,372
1984	0	10,625,443	0	9,998,322	0	8,374,808	769,741	29,768,312
1985	0	18,286,882	0	23,135,347	0	8,483,517	503,013	51,308,760
1986	0	10,733,330	9,312,87[illegible]	35,648,129	0	8,868,783	494,226	65,057,652
1987	0	11,800,842	10,337,55[illegible]	54,377,215	0	9,361,843	1,349,597	87,227,149
1988	0	11,076,466	11,380,508	67,433,148	1,288,754	9,812,636	1,188,606	102,180,645
1989	0	12,806,937	11,934,279	75,126,068	18,860,69[illegible]	9,731,791	1,318,819	129,488,795
1990	11,032,089	11,858,858	1,274,84[illegible]	77,052,310	20,278,927	6,007,519	964,270	128,468,867
1991	13,584,702	10,177,819	1,418,13[illegible]	84,443,180	20,181,188	6,044,459	632,983	146,482,466
1992	14,001,455	10,305,936	1,511,83[illegible]	100,397,465	16,934,859	5,978,182	58[illegible],244	149,705,273
1993	18,072,262	10,084,813	1,542,[illegible]41	105,178,181	6,856,247	5,512,102	58[illegible],202	151,832,938
1994	19,851,160	10,212,090	1,542,61[illegible]	102,364,639	4,704,543	3,760,909	463,383	152,008,441
1995	23,680,164	10,492,008	1,597,[illegible]77	103,603,320	6,895,932	3,781,321	607,672	155,938,213
1996	0	0	0	42,217,947	1,572,990	0	452,704	44,243,802
TOTALS	100,221,832	139,136,893	51,861,[illegible]46	908,831,981	100,074,001	116,999,784	10,43[illegible],882	1,433,817,236

1. 1996 payments through February, 1996. St. Louis expenditures do not include magnet capital.
2. St. Louis expenditures obtained from annual auditor's report.
3. Prior to 1990, magnet costs were paid under the Quality Education and Interdistrict Plans.
4. VICC and county capital expenditures included in VIDT column.
5. Miscellaneous costs primarily include desegregation auditor fees.

TOTFUND.XLS

ATTACHMENT 3

TOTAL FUNDING OF DESEGREGATION MEASURES BY THE SLPS

Fiscal Year	Magnet Plan	Quality Education Plan	Part-Time Programs	VIDT Funding	Capital Funding	Intradistrict Plan	Committee/ Misc.	Totals
1981	0	0	0		0	8,605,451	0	8,503,451
1982	0	0	0	0	0	8,607,934	0	8,807,934
1983	0	0	0	0	0	8,130,268	16,461	8,[illegible]48,729
1984	0	10,626,463	0	0	0	8,378,806	397,011	19,407,280
1985	0	19,265,881	0	0	0	8,493,617	553,822	28,313,220
1986	0	10,733,359	0	0	0	8,869,762	675,856	20,278,977
1987	0	11,800,841	0	0	0	9,38[illegible],843	353,393	21,616,077
1988	0	11,676,485	0	0	946,074	8,612,636	379,226	22,[illegible]10,432
1989	0	12,605,936	0	0	6,268,399	8,73[illegible],761	585,462	28,[illegible]91,898
1990	11,032,088	11,886,846	0	0	7,787,015	8,007,519	559,277	37,[illegible]42,797
1991	13,564,701	10,177,616	0	0	10,162,866	8,04[illegible],459	470,231	40,[illegible]38,777
1992	14,001,456	10,308,916	0	0	15,128,399	5,973,161	468,536	45,877,510
1993	16,072,253	10,084,813	0	0	9,845,208	6,61[illegible],101	343,154	43,957,527
1994	18,851,149	10,212,068	0	0	4,698,078	6,76[illegible],908	344,599	40,654,633
1995	23,860,184	10,492,005	0	0	20,439,288	6,761,320	439,171	60,301,969
1996	0	0	0	0	1,418,985	0	384,868	1,803,863
TOTALS	100,221,831	139,134,469	0	0	76,694,822	118,086,729	5,991,068	439,949,963

1. 1995 payments through February, 1996. St. Louis expenditures does not include magnet capital.
2. St. Louis expenditures obtained from annual auditor's report.
3. Prior to 1990, magnet costs were paid under the Quality Education and Intradistrict Funds.
4. VICC and county capital expenditures included in VIDT column.
5. SLPS miscellaneous costs for desegregation auditor fees not included.

TOTFUND.XLS

ATTACHMENT 4

TOTAL FUNDING OF DESEGREGATION MEASURES BY THE STATE AND SLPS

Fiscal Year	Magnet Plan	Quality Education Plan	Part-Time Programs	VIDT Funding	Capital Funding	Intradistrict Plan	Audit Adjustment	Committee/ Misc.	Totals
1981	0	0	0		0	17,133,451	0	0	17,133,451
1982	0	0	0	157,327	0	17,232,369	0	0	17,389,696
1983	0	0	0	4,398,164	0	16,260,537	0	519,401	21,178,101
1984	0	21,250,668	0	9,966,322	0	16,749,612	(6,744,962)	1,168,752	42,418,590
1985	0	38,631,765	0	23,136,347	0	16,967,034	(1,324,382)	1,057,635	78,367,616
1986	0	21,466,659	8,312,171	36,648,129	0	17,739,565	(6,939,193)	1,170,084	78,397,436
1987	0	23,601,663	10,337,651	54,377,216	0	18,723,666	(2,614,481)	1,702,990	106,128,745
1988	0	22,150,991	11,360,605	67,433,140	2,248,627	18,626,676	(2,380,435)	1,666,031	122,024,641
1989	0	25,011,673	11,934,270	75,128,066	25,109,289	19,469,562	1,361,663	1,911,301	159,920,266
1990	22,064,177	23,713,796	1,274,644	77,052,310	28,065,942	12,015,036	(2,602,466)	1,523,547	162,807,166
1991	27,169,403	20,356,637	1,418,135	94,443,160	30,343,756	12,066,918	(1,749,220)	1,103,214	185,174,022
1992	28,002,911	20,611,672	1,611,332	100,397,466	32,083,068	11,948,363	119,244	1,049,762	195,702,027
1993	36,144,605	20,169,628	1,342,141	106,179,161	19,700,453	11,024,203	(2,658,675)	930,356	192,833,590
1994	39,902,299	20,424,196	1,642,519	109,364,639	8,300,621	11,601,018	(827,764)	627,962	191,936,520
1995	47,160,368	20,984,011	1,597,777	106,603,320	27,435,221	11,502,641	0	1,046,843	216,330,182
1996	0	0	0	42,217,947	2,991,946	0	0	837,572	46,047,465
TOTALS	200,443,683	278,272,863	61,661,448	906,631,661	177,298,912	226,904,613	(26,967,641)	16,413,606	1,633,966,656

1. 1996 payments through February, 1996. St. Louis expenditures does not include magnet capital.
2. St. Louis expenditures obtained from annual auditor's report.
3. Prior to 1990, magnet costs were paid under the Quality Education and Intradistrict Funds.
4. VICC and county capital expenditures included in VIDT column.
5. Committee/Misc. does not include $1,517,206 spent by Special School District on various committees.
6. Miscellaneous costs generally includes desegregation auditor fees.

TOTFUND.XLS

ATTACHMENT 5

TOTAL FUNDING OF DESEGREGATION MEASURES BY THE STATE

	PROGRAM ACCOUNT	CAPITAL ACCOUNT	TEACHER'S SALARIES	DIRECT COST	DMC/MISC PAYMENTS	VIT/TAD	SHARENET	SURCHARGE REFUNDS	REIMBURSEMENTS	TOTAL PAYMENTS
FY 1986	7,413,658	5,218,068	0	0	142,200	0	0	0	0	12,773,926
FY 1987	14,609,894	21,941,936	0	0	156,391	0	0	0	0	36,708,220
FY 1988	44,501,000	19,562,315	0	0	157,746	0	0	0	0	64,221,061
FY 1989	59,757,506	16,520,380	0	0	141,176	0	0	29,422,048	(2,610,215)	105,230,895
FY 1990	75,867,483	35,084,377	0	0	223,722	0	0	372,207	(5,880)	111,541,910
FY 1991	77,599,713	46,880,196	15,010,433	0	436,142	125,104	0	3,790	(25,241,317)	116,814,061
FY 1992	100,163,219	43,868,663	14,426,230	0	237,468	243,883	0	476	(329,069)	158,610,870
FY 1993	81,055,864	22,978,304	22,250,565	7,965,247	339,545	316,185	0	0	0	134,905,710
FY 1994	94,940,373	12,618,313	34,750,893	3,750,000	269,371	194,126	669,233	0	0	147,192,310
FY 1995	106,669,899	19,285,386	41,471,814	7,500,000	285,377	246,389	(105,000)	0	0	175,353,867
FY 1996	110,053,766	14,532,872	415	0	130,119	169,775	0	0	0	124,886,947
TOTAL	772,632,376	262,290,909	127,910,361	19,216,247	2,619,268	1,296,462	564,233	29,798,521	(29,186,480)	1,186,038,776

1. Expenditures for FY 1996 as of June 30, 1996.
2. The State's expenditures for program, capital, and salary includes interest (minus service charge) earned on the bank accounts.
3. Kansas City program expenditures were obtained from KCMSD's Desegregation Expenditure Reports KCMSD's FY 96 program expenditures cannot be determined - KCMSD has combined their General Operating and Desegregation Budgets.
4. Kansas City capital expenditures were obtained from KCMSD's Capital Drawdown Reports.
5. Kansas City salary expenditures were obtained from KCMSD's Desegregation Expenditure Reports
6. Represents a Sharenet refund (computers, software, etc.).
7. Reimbursements were for escrowed property taxes, duplicate drawdown from KCMSD, late activity transportation costs, duplicate furniture purchases, operating budget repayment of disallowed extended day expenses and operating revenue for foundation formula prop C.

KCTOTAL.xls
6/9/96

ATTACHMENT 6

TOTAL FUNDING OF DESEGREGATION MEASURES BY THE KCMSD

	PROGRAM ACCOUNT	CAPITAL ACCOUNT	TEACHER'S SALARIES	DIRECT COST	DMC/MISC PAYMENTS	VIT/TAD	SHARENET	SURCHARGE REFUNDS	REIMBURSEMENTS	TOTAL PAYMENTS
FY 1988	4,895,110	460,773	0	0	0	0	0	0	0	5,355,883
FY 1987	22,496,179	6,356,730	0	0	0	0	0	0	0	28,852,909
FY 1989	17,468,701	4,235,752	0	0	0	0	0	0	0	21,704,453
FY 1989	30,505,702	20,075,542	0	0	0	0	0	0	0	50,581,244
FY 1990	24,627,572	41,954,799	0	0	0	0	0	0	0	66,582,371
FY 1991	54,832,885	53,961,157	15,010,433	0	0	0	0	0	0	123,804,455
FY 1992	33,825,088	45,916,515	14,426,230	0	0	0	0	0	0	94,167,833
FY 1993	47,867,704	6,982,105	22,250,565	0	0	0	0	0	0	77,100,374
FY 1994	33,436,805	7,902,464	34,750,893	0	0	0	0	0	0	76,090,162
FY 1995	35,766,801	19,077,141	41,471,814	0	0	0	0	0	0	96,315,756
FY 1996	0	16,831,260	415	0	0	0	0	0	0	16,831,675
TOTAL	306,722,627	226,754,238	127,810,361	0	0	0	0	0	0	869,387,116

1. Expenditures for FY 1996 as of June 30, 1996.
2. The State's expenditures for program, capital, and salary includes interest (minus service charge) earned on the bank accounts.
3. Kansas City program expenditures were obtained from KCMSD's Desegregation Expenditure Reports. KCMSD's FY 96 program expenditures cannot be determined - KCMSD has combined their General Operating and Desegregation Budgets.
4. Kansas City capital expenditures were obtained from KCMSD's Capital Drawdown Reports.
5. Kansas City salary expenditures were obtained from KCMSD's Desegregation Expenditure Reports.
6. Represents a Sharenet refund (computers, software, etc.).
7. Reimbursements were for escrowed property taxes, duplicate drawdown from KCMSD, late activity transportation costs, duplicate furniture purchases, operating budget repayment of disallowed extended day expenses and operating revenue for foundation formula prop C.

KCTOTAL.xls
8/9/96

ATTACHMENT 7

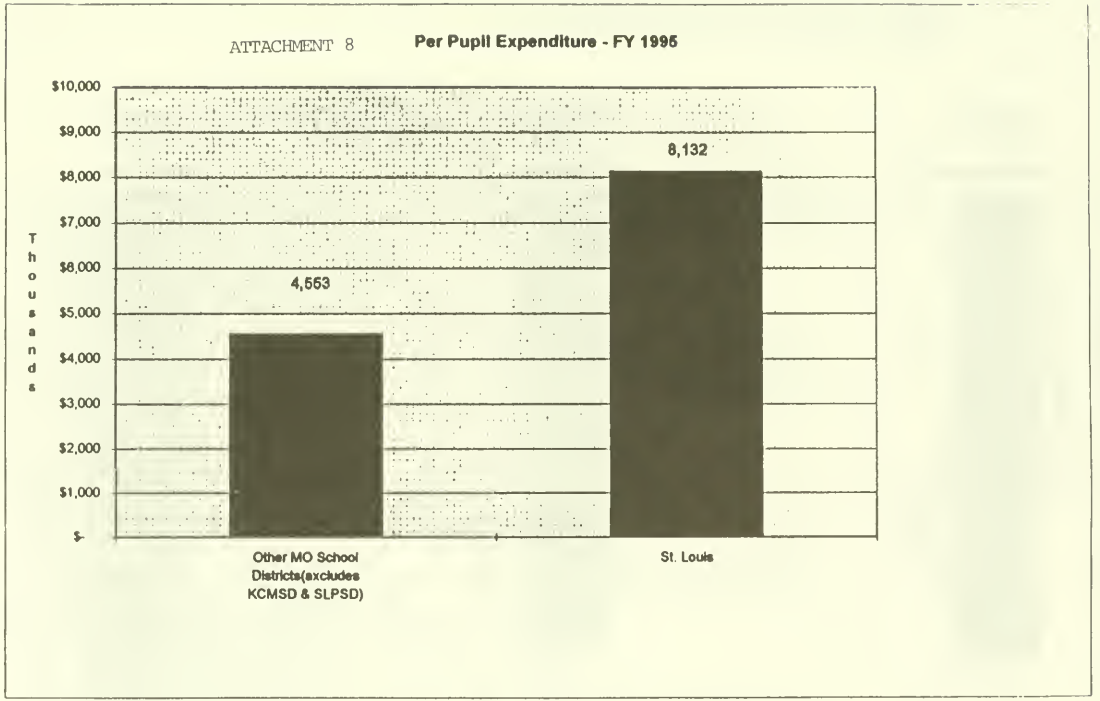
TOTAL FUNDING OF DESEGREGATION MEASURES BY THE STATE AND KCMSD

	PROGRAM ACCOUNT	CAPITAL ACCOUNT	TEACHER'S SALARIES	DIRECT COST	DMC/MISC PAYMENTS	VIT/TAD	SHARENET	SURCHARGE REFUNDS	REIMBURSEMENTS	TOTAL PAYMENTS
FY 1988	12,308,768	5,676,641	0	0	142,200	0	0	0	0	18,129,809
FY 1987	37,106,073	28,298,666	0	0	156,391	0	0	0	0	65,561,129
FY 1988	61,969,701	23,798,067	0	0	157,746	0	0	0	0	85,925,514
FY 1989	90,263,208	38,595,922	0	0	141,176	0	0	29,422,048	(2,610,215)	155,812,139
FY 1990	100,495,055	77,039,176	0	0	223,722	0	0	372,207	(5,880)	178,124,281
FY 1991	132,432,578	102,641,353	30,020,866	0	436,142	125,104	0	3,790	(25,241,317)	240,418,517
FY 1992	133,988,307	89,785,178	28,852,460	0	237,468	243,883	0	476	(329,069)	252,778,703
FY 1993	128,923,568	29,960,409	44,501,129	7,985,247	339,545	316,185	0	0	0	212,006,083
FY 1994	128,377,178	20,520,777	69,501,786	3,750,000	269,371	194,126	669,233	0	0	223,282,472
FY 1995	142,436,700	38,362,527	82,943,629	7,500,000	285,377	246,389	(105,000)	0	0	271,669,623
FY 1996	110,053,786	33,364,132	831	0	130,119	169,775	0	0	0	143,718,623
TOTAL	1,078,364,902	488,046,847	255,820,702	19,235,247	2,619,268	1,295,462	564,233	29,798,521	(28,186,480)	1,847,426,892

1. Expenditures for FY 1996 as of June 30, 1996.
2. The State's expenditures for program, capital, and salary includes interest (minus service charge) earned on the bank accounts.
3. Kansas City program expenditures were obtained from KCMSD's Desegregation Expenditure Reports KCMSD's FY 96 program expenditures cannot be determined - KCMSD has combined their General Operating and Desegregation Budgets.
4. Kansas City capital expenditures were obtained from KCMSD's Capital Drawdown Reports.
5. Kansas City salary expenditures were obtained from KCMSD's Desegregation Expenditure Reports.
6. Represents a Sharenet refund (computers, software, etc.).
7. Reimbursements were for escrowed property taxes, duplicate drawdown from KCMSD, late activity transportation costs, duplicate furniture purchases, operating budget repayment of disallowed extended day expenses and operating revenue for foundation formula prop C.

KCTOTAL.xls
8/9/96

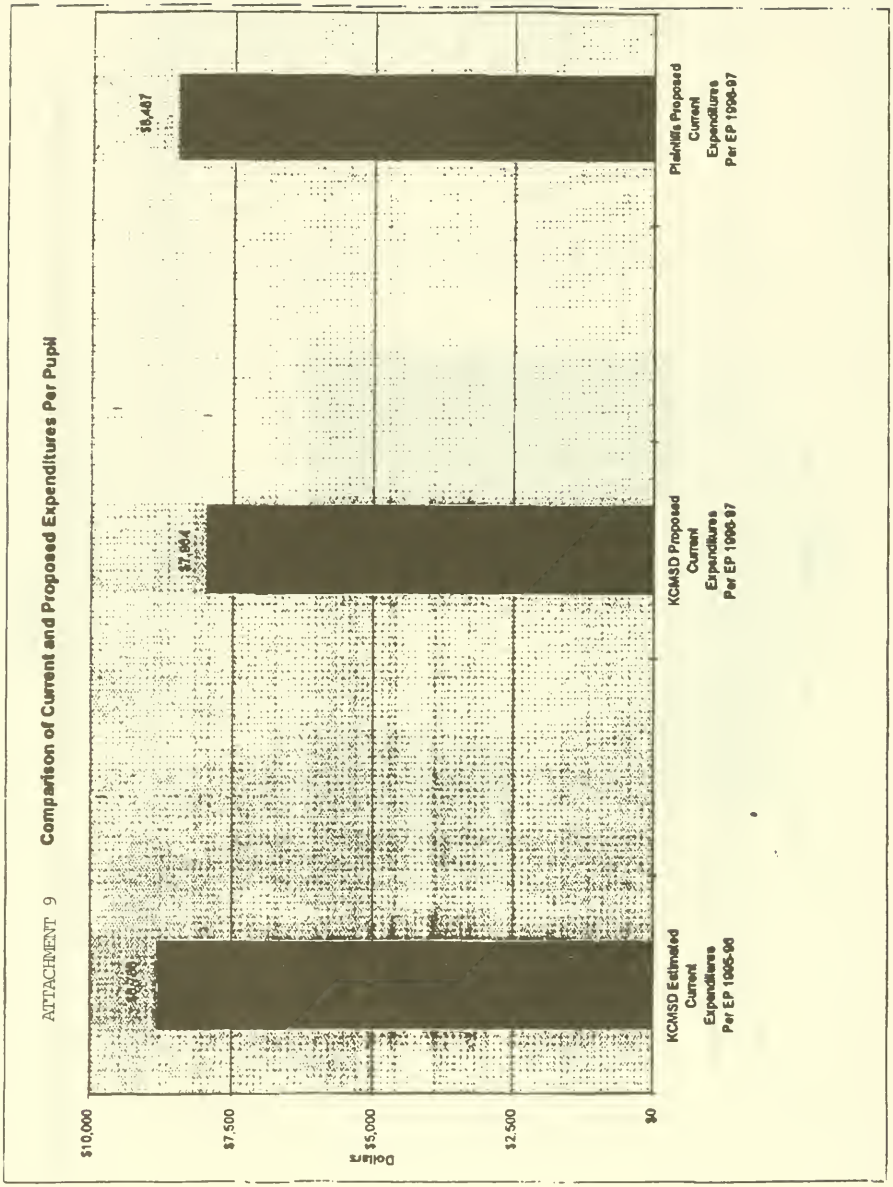
ATTACHMENT 8



SLPPROJC.XLS

SLPSD EP's do not include "Phantom" students; other Missouri School District EP's include "Phantom" students transfering to St. Louis County School District's, but amount is negligeable.

EXPPUPL.XLS


ATTACHMENT 9
Comparison of Current and Proposed Expenditures Per Pupil
$10,000
$7,500
$5,000
$2,500
$0
Dollars
$6,487
$7,664
KCMSD Estimated Current Expenditures Per EP 1995-96
KCMSD Proposed Current Expenditures Per EP 1996-97
Plaintiffs Proposed Current Expenditures Per EP 1996-97

ATTACHMENT 10

TOTAL PAYMENTS FOR
ST. LOUIS DESEGREGATION COMMITTEES

FISCAL YEAR	STATE	SLPS	SPECIAL SCHOOL DISTRICT	TOTAL
1981	0	0	0	0
1982	0	0	0	0
1983	425,936	16,461	0	442,397
1984	885,450	397,011	49,540	1,332,001
1985	855,373	553,822	50,312	1,459,507
1986	830,559	675,856	52,531	1,558,945
1987	1,899,476	353,393	58,761	2,311,630
1988	1,944,006	379,225	66,353	2,389,586
1989	2,029,702	595,482	132,728	2,757,909
1990	1,809,236	559,277	124,209	2,492,722
1991	1,557,657	470,231	140,048	2,167,936
1992	1,856,724	468,538	104,160	2,229,423
1993	1,682,703	343,154	206,872	2,232,729
1994	1,833,825	344,599	137,505	2,115,929
1995	2,080,280	439,171	151,471	2,670,922
1996	1,350,804	384,868	242,718	1,978,191
TOTALS	20,641,535	5,981,088	1,617,206	28,139,828

1. Fiscal Year 96 payments through January 31, 1996.

TOTCOMM.XLS

ATTACHMENT 11

STATE PAYMENTS FOR ST. LOUIS DESEGREGATION COMMITTEES

FISCAL YEAR	VICC	MCC	EMAC	MRC	COE	BRC	DMAC	KIRKWOOD COORD COMM.	ST. LOUIS CAREER ED. DIST.	METRO COORD COMM.	VOC.ED. AMICUS	VEQQ	AMICUS	TOTALS
1981	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1982	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1983	0	0	0	0	16,461	0	0	213,935	0	195,540	0	0	0	425,936
1984	293,718	372,116	0	124,555	35,127	59,509	0	0	0	0	0	0	424	885,450
1985	394,015	303,818	0	123,974	0	33,277	0	0	0	0	0	0	289	855,373
1986	356,515	304,472	0	125,830	14,086	27,840	0	0	0	0	0	0	1,816	830,559
1987	779,321	708,211	0	227,731	85,284	7,829	79,210	0	0	0	0	0	11,890	1,899,476
1988	806,597	698,296	0	236,039	92,075	20,572	88,459	0	0	0	0	0	1,170	1,944,008
1989	865,086	684,096	0	250,418	110,027	16,693	101,363	0	0	0	0	0	2,020	2,029,702
1990	867,991	631,586	268,395	0	0	40,614	0	0	0	0	0	0	650	1,809,236
1991	1,032,117	195,358	290,852	0	0	39,330	0	0	0	0	0	0	0	1,557,657
1992	1,099,500	168,819	303,478	0	0	33,368	0	0	0	0	40,000	0	11,539	1,656,724
1993	1,121,091	174,445	303,777	0	0	18,488	0	0	0	0	60,000	0	4,902	1,682,703
1994	1,176,032	129,932	318,017	0	0	7,291	0	0	0	0	0	0	2,553	1,633,825
1995	1,496,608	123,084	411,735	0	0	24,118	0	0	0	0	0	21,418	3,318	2,080,280
1996	922,900	0	179,182	0	0	3,595	0	0	199,882	0	0	42,837	2,210	1,350,604
TOTALS	11,211,490	4,494,233	2,075,437	1,089,348	353,061	332,534	269,031	213,935	199,882	195,540	100,000	64,255	42,981	26,641,535

1. Fiscal Year 96 payments through January 31, 1996.

STATECOM.XLS

SENATOR GRASSLEY. Professor Cheh.

STATEMENT OF MARY M. CHEH

Ms. CHEH. Thank you for inviting me, Mr. Chairman and Senator Heflin.

The subject of the committee hearing is primarily the legislation that has been proposed, though I understand you want to broaden this topic to other matters. Other witnesses you have just heard do speak to the larger matters of school desegregation decrees, their scope, operation, flexibility, and discretion given judges and to masters, the cost.

In terms of the invitation to come here today, I was asked to look at the proposal and I have confined much of my testimony to suggestions for improving that proposal. I think it is an important proposal and I think it may accomplish a good result, but I might want to suggest, if I may, some modifications that you might consider.

Since I have anchored my testimony primarily in the proposal, my remarks will be focused on that. But, of course, there is a larger issue that underlies it and we can maybe get to that when we take up some questions.

Before looking at the specific proposal, which I characterize as having three main features, I wanted to identify a couple of general propositions that I think should guide the committee in thinking about this proposal and maybe some others that may come forward.

First, and I think it is unremarkable to state that courts should not be in the business of imposing taxes. It is a legislative prerogative. The legislature is responsible and should be held accountable.

But nevertheless, another general proposition, courts are empowered to fashion equitable remedies and their remedies can be as broad as the harm that they are addressing and equity can, as we often say, command to be done that which ought to be done. In some instances, it may be necessary in the case of resistance or recalcitrance, intentional refusal to pay for appropriate remedies that a court may find it necessary to direct a governing body to raise revenue.

A third general proposition relates specifically to Congress and control of the lower court jurisdiction. Of course, again, unremarkable, the Congress has broad power to control the jurisdiction of the lower Federal courts, but once it confers the jurisdiction, its power to control the remedies that those courts can order is not unlimited and there may be situations where Congress would exceed its jurisdiction if it took away the only effective remedy to take care of a particular constitutional harm.

Now, within the framework of those general propositions, I think that the proposal to put restrictions on judges that they would have to consider and comply with before they issued an order to a governing body to raise revenue, the legislation within that framework is probably sound, but there may be some aspects of it that may need some modification.

I looked at the legislation basically in three areas. One is the findings. Ordinarily, findings are without operative effect per se. They may help the courts interpret what the legislation is. It may

sort of steer them in the right direction. But sometimes, depending upon how they are phrased, you can have findings being given operative effect.

In terms of the way these findings are set out, they do speak in directive language, "courts should" and that sort of thing, which suggests that maybe they are meant to have some substantive effect or could be so interpreted. If they are, there is some language in there that is rather troubling and may be beyond what the committee intended.

In the findings section, there is reference to applying the limitations, limiting them even in cases where a judge's order results in, not just issues an order to but results in taxation or an increase in taxation, and I suggest in my testimony that you may not have meant to have such a broad effect, because a lot of orders that could be issued, wholly apart from desegregation orders, just conventional orders to pay a judgment that may be a large amount, may result down the road in an increase in taxation, and I assume the proposal is not meant to capture all of those applications.

The second part, which is the main part of the bill, as I understand it, are the six limitations that are imposed on judges before they issue orders directing the increase in revenues. And as to those, it seems to me, if put in its proper perspective, those limitations, some of them, are consistent with what Congress may do and are even consistent, at least with the terminology, maybe not the effects, of what the Supreme Court has said lower Federal courts can do.

That is to say, you can tell lower Federal courts not to issue these orders unless they are absolutely necessary and to make findings in accordance with that, except that some of the limitations that are put in this bill do go beyond that and they may in some instances restrict use of the remedy where it would be absolutely necessary to remedy a constitutional harm that the courts had found.

Finally, and I will open myself up, of course, to any questions you have on these points, but just to set them out on the table, the last aspect is the granting of standing to a variety of individuals and entities in this bill, and generally speaking, the issue about standing is not problematic if all we are doing is allowing people to come and intervene and make their position known, introduce testimony, and so on.

However, the very framing of the legislation seems to allow any person who is a taxpayer or merely lives in a jurisdiction where a tax order has been issued to not only join in an intervener status but even to appeal judges' rulings when nobody else is appealing. To the extent that the proposal does that, it may confer standing where standing does not exist under article III, and as you know, the courts have said that the minimum requisites of article III have to be met before any party can proceed. There is a remedy for that, and I can suggest language for you to limit it so that the standing issue goes away.

But in conclusion, as I said, anchored in this particular proposal, I think the proposal responds to a serious problem and, in many respects, responds well, but I simply wanted to offer some suggestions about how it might be improved. What I do not discuss are

these larger issues of desegregation decrees in general and they may be driving more of the issue about funding orders than anything else.

If what the committee wants to do is focus on them, I think we would have to think long and hard. I know I would want to think longer and harder about such issues as scope of remedy, the authority given to masters, and whether the Congress has some role to play in restricting that. As I said, I have focused my remarks on the proposal itself. Thank you.

[The prepared statement of Ms. Cheh follows:]

PREPARED STATEMENT OF MARY M. CHEH

SUMMARY

A few general propositions should guide the Committee's analysis of this bill. First, and consistent with the sponsors' underlying concern, taxation is not a judicial function and federal courts should not be in the business of levying taxes. Quite plainly taxation is a legislative power and a legislative prerogative. Elected officials must bear the responsibility and be accountable for tax impositions.

Second, and nevertheless, federal courts are empowered to fashion equitable orders to enforce and protect constitutional rights. So long as such orders are themselves constitutional, they may be as broad as the wrong to which they are addressed. In a exceedingly rare case, the only effective means of redressing a constitutional violation may be an order directed to a governing body to raise revenue to finance specific remedial actions.

Third, although Congress has broad power to control the jurisdiction of the federal courts, including the power to limit the remedies which federal courts may employ, Congress may not preclude the use of enforcement orders where, to do so, would deprive a party of a constitutionally guaranteed right or would deprive a party of the only effective means of redressing a constitutional harm.

Set in the framework of these propositions, some sections of the proposed legislation, as currently drafted, may exceed Congressional power to control the jurisdiction of the federal courts. Other sections, which appear to be within Congress' power, codify existing Supreme Court precedent and serve the salutary purpose of clarifying the exceptionally narrow circumstances in which a court may direct a governing body to raise taxes.

The proposed legislation may also run afoul of Article III standing limitations by conferring upon "intervenors" a right to appeal where such intervenors do not have a sufficient personal stake to challenge a court's order.

INTERPRETATION AND ANALYSIS

The three key features of the bill are: (1) various findings, (2) a ban on federal court orders or settlements which "impose, increase, levy, or assess any tax" unless certain findings are made, together with a limitation on the life of such orders and other restrictions, (3) intervenor status granted to any person in a jurisdiction in which a tax order is imposed, and standing to such intervenor to appear, present evidence, and appeal. Each feature raises different interpretive and analytical problems.

(1) The findings

The chief question about this section is whether the findings are to be given any operative effect. Findings may assist courts in understanding the basis for Congressional action or in construing ambiguous statutory language. *See, e.g., Cheffer* v. *United States*, 55 F. 3d 1517 (11th Cir. 1995). But, in general, findings do not relieve courts of independently finding facts relevant to a cause of action nor are they given independent legal effect. *See, e.g. Webster* v. *Reproductive Health Services*, 492 U.S. 490 (1989) (over dissent, plurality views preamble announcing state's view of when life begins as only state's expression of a value judgment). Yet, depending on draftmanship, "findings" in a particular piece of legislation may be construed as operative substantive provisions.

In this legislation certain findings are actually framed as directives. For example section 2.(5) states that, "no court *should* enter an order * * *," and section 2.(6) states that, "a settlement agreement or order entered by a Federal court should be fashioned within the framework of the budgetary restraints of any affected State * * * (emphasis supplied).

If the findings are given operative effect, some provisions may have the unintended consequence of broadly curtailing the remedial powers of federal courts. For example, section 2.(4) provides: "when a federal court issues an order that requires or *results in* the imposition, increase * * * of any tax, the court—

(A) Exceeds the proper boundaries of the limited jurisdiction and authority of Federal courts * * * (emphasis supplied). Section 2.(5) includes similar "or results in" language. This "or results in" language potentially reaches any order compliance with which leads to a tax hike. To illustrate, a locality may be ordered to pay a large money judgment for official mistreatment of its citizens. Or it may be required to make extensive improvements in public buildings to make them safe for workers and visitors. If the governing body claims that it cannot pay for the judgment or make the improvements within existing revenues, these fairly conventional court orders could be orders "that result in the imposition, increase * * * of any tax * * *."

(2) Limits on orders and settlements which Impose taxes

The heart of this bill is the ban on any court orders that require the levying of a tax unless certain conditions are satisfied. The bill does not ban such orders altogether. There are six conditions. Three appear consistent with current law, three others appear problematic.

(a) Distinguishing Between Underlying Decrees and Orders To Implement and Enforce Decrees

To begin, it should be noted that orders mandating the levying of taxes are a means to fund an otherwise proper remedy, that is, a means to enforce a proper remedy. If a court remedy is improper, then the means of enforcing it become irrelevant since an improper or overbroad order may not be enforced. If, however, a remedy is proper, and if a court faces official unwillingness or inability to implement it, the court is broadly empowered to coerce compliance.

The distinction between a remedy and the means to enforce it is illustrated in the very case that gives rise to this proposed legislation, namely *Missouri* v. *Jenkins,* 495 U.S. 33 (1990) (*Jenkins II*). There a district court had found that the Kansas City, Missouri School District and the state of Missouri operated a segregated school system. The district court set about to cure this constitutional violation an its lingering effects by essentially making the entire Kansas City Missouri school system into a fabulously equipped magnet school program. The capital and operating costs for such a program were staggering, running into hundreds of millions of dollars. Yet in *Jenkins II* the majority of justices did not permit the state to challenge the scope of the district court's desegregation plan; it simply accepted the Court of Appeals conclusion that the desegregation remedy was proper. Thus, in *Jenkins II*, the state was unable to challenge the broad and expensive desegregation plan that created the need for raising revenue in the first place. Frustrated, the state of Missouri noted: " '[t]he only reason that the court below needed to consider an unprecedented tax increase was the equally unprecedented cost of its remedial programs.' " 495 U.S. at 53.

Later, however, in *Missouri* v. *Jenkins*, 115 S. Ct. 2038 (1995) (*Jenkins III*), the Supreme Court held that the district court, in remedying intradistrict segregation, did not have authority to create a magnet district to serve the interdistrict goal of attracting non-minority students. The majority emphasized that the proper goal of district court desegregation orders was to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct and to restore state and local authorities to the control of a school system operating in compliance with the constitution. The goal of reversing white-flight via the magnet school concept, or achieving "desegregative attractiveness," was found to be beyond the district courts powers to remedy the harm found. A court is permitted to remedy only those harms caused by the constitutional violation.

Certain sections of the proposed legislation, for example Section 3.(a)(1)(A)(ii), may reflect a failure to distinguish between a court order to enforce a desegregation or other remedial plan and the plan itself. To the extent this is so, the committee may want to clarify what its objectives are.

(b) What Means of Enforcement Are Permissible

Assuming an underlying desegregation plan (or other court order) is appropriate, the question then arises, what methods of enforcement may a court employ. Equity empowers courts to fashion and shape its decrees to produce effective and prompt results. In the desegregation context, courts may, for example, close schools, reassign pupils, order busing, or require capital improvements. And, in the face of resistance and non-compliance, courts may enforce their decrees through contempt citations, fines, injunctions, and orders directing elected officials to take specific official acts. Where appropriate, courts may even order a governing body to levy taxes, *Grif-*

fin v. *Prince Edward County School Bd.,* 377 U.S. 218 (1964); *Jenkins (II)*; or force legislators to adopt an ordinance, *see Spallone* v. *United States,* 493 U.S. 265 (1990).

Rejecting constitutional barriers based on separation of powers and federalism limitations, the majority in *Jenkins (II)* specifically stated that "a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court." 495 U.S. at 55. In addition, the Court said, a state-imposed limit on the local governing body's authority to raise funds may properly be disregarded if "required," that is, if the limitation operates to hinder the vindication of federal constitutional guarantees. 495 U.S. at 57, citing *North Carolina Bd. of Education* v. *Swann,* 402 U.S. 43, 45 (1971). For the dissenters, Justice Kennedy said he saw no distinction between a judicial order raising taxes and a judicial order telling the governing body to raise taxes, he doubted whether a judicial tax order could ever be constitutional, and he said that, even if such an order were warranted in an extreme case, this was not such a case. 495 U.S. at 63–64.

Interestingly both the majority and the dissent in *Jenkins II* referred to *Griffin* v. *Prince Edward County School Bd.,* 377 U.S. 218 (1964). The majority relied on *Griffin* as an instance of a permissible judicial order to levy taxes. The dissent distinguished *Griffin* and found it inapposite but, nevertheless, found it presented a "closer question." at 71.

The facts of *Griffin* were dramatic. For over ten years the Prince Edward County, Virginia school system deliberately delayed and frustrated school desegregation orders. The school employed lawsuits, legislative actions, and other tactics to avoid compliance with court rulings. The county even went so far as to close all of the public schools while, at the same time, providing tuition grants and tax credits to parents of white children attending private schools. In this context the Supreme Court insisted that quick and effective relief be granted and, among other options, stated that: "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." 377 U.S. at 233.

In *Spallone* the Supreme Court set aside a district court's contempt citations against individual council members for their failure to vote for an ordinance. Importantly, the Court refused to rule that such enforcement orders were unconstitutional. It held only that traditional equity principles required that less drastic remedies be tried first. the Contempt orders followed the council members' refusal to vote for legislation implementing a consent decree. The decree was agreed to by the city and the plaintiffs after a lengthy lawsuit finding Yonkers guilty of intentional racial discrimination in city housing. The Supreme Court said that the district court should try imposing fines against the city itself before it held the councilmen in contempt. As it turned out, the city complied with the district court order once it was clear that it would face substantial momentary fines.

Thus, orders directing governing bodies to raise taxes or adopt legislation may be permissible under some circumstances. However, the Supreme Court has also made it quite plain that such actions are exceptional, drastic, and highly unusual. Indeed in *Missouri* v. *Jenkins,* 495 U.S. 33 (1990) (*Jenkins II*), the Supreme Court called a tax increase by a federal court "an extraordinary event." And, the Court said, "[b]efore taking such a drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." 495 U.S. at 51.

Similarly, in *Spallone,* the Court characterized the contempt order against the Yonkers councilmen as "extraordinary." It was extraordinary because, although neither the constitutional speech and debate clause nor common law legislative immunity were at stake, the considerations underlying those protections "must inform the District Court's exercise of its discretion." As the Court noted, "any restriction on a legislator's freedom undermines the public good by interfering with the rights of the people to representation in the democratic process."

(c) Congressional Control Over District Court Enforcement Orders

Under Article III, Congress has broad power to control the jurisdiction of the lower federal courts. There is extensive scholarly debate concerning the precise scope of this power, but this proposed legislation seeks to regulate only a small aspect of jurisdiction, namely a restriction on the use of certain remedies.

There are few precedents in this area because Congress has been abstemious in the use of its powers. But, when challenged congressional limitations on federal court remedies have been upheld. However, when the few relevant cases are read closely, they stand for the proposition that, although Congress' powers are broad, they are not unlimited. Congress may not restrict remedies in such a way as to deny

a litigant the only effective remedy available to redress his legal rights nor may it deny use of remedies where, to do so, would deprive a person of constitutionally guaranteed rights. *See e.g., Phillips* v. *Commissioner,* 283 U.S. 589 (1931) (anti-injunction provisions of the Internal Revenue Code upheld because the Court found Congress had provided alternative adequate remedies). Indeed Congress itself accepts this principle and has drafted its remedy-limiting legislation consistent with it. *See e.g.* 29 U.S.C.A. §§ 101–15 (The Norris-LaGuardia Act) (injunctions may not be issued in labor disputes except that they are permissible if, without an injunction, a party will suffer substantial and irreparable injury with no adequate remedy at law). See generally Nowak & Rotunda, *Constitutional Law,* § 2.10 (5th ed. 1995).

S. 1817 provides that no district court may enter an order requiring a tax hike *unless* there are no other means available to remedy the deprivation of rights (§ 3,(a)(1)(A)(I)), the order is narrowly tailored (§ 3.(a)(1)(A)(ii)), the order will not exacerbate the deprivation to be remedied (§ 3.(a)(1)(B)), and plans submitted by government officials are ineffective (§ 3.(a)(1)(F)). These provisions leave open ample alternatives to a tax levy order. Indeed they are consistent with Supreme Court precedent that a tax remedy order is "drastic" and not to be entered into unless other options are exhausted.

However, S. 1817 imposes than conditions that may foreclose the use of the tax levy order in circumstances where it is the only effective remedy for implementing lawful court orders. A tax levy order may "result in a loss of revenue for the political subdivision" (§ 3(a)(1)(c); or it may result in a depreciation in property values (§ 3.(a)(1)(D)); or it may "conflict with the applicable laws with respect to the maximum rate of taxation" (§ 3.(a)(1)(E). It may still be the *only* way to prevent continuing violations of constitutional rights. To that extent, these provisions exceed congressional power.

(3) Intervenor status and standing to appeal

Section 3.(a)(3) grants "any aggrieved corporation, or unincorporated association or other person residing in * * * the [tax-affected] political subdivision * * * or "other entity located within that subdivision" * * * "the right to intervene in any proceeding concerning * * * the tax," Intervention includes the right to appear, present evidence, give testimony, and "appeal any finding required to be made by this section * * *" Aggrieved is not defined, but the section's additional reference to "other entity" seems to contemplate that any taxpayer or property owner in the relevant tax-affected jurisdiction may enjoy a right of intervention.

There appears to be no requirement that the taxpayer/property owner "intervenor" suffer any particularized or special harm (i.e., a special assessment against an individual taxpayer) or that he or she satisfy the constitutional requirements for taxpayer standing. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Valley Forge Christian College* v. *Americans United for Separation of Church and State,* 454 U.S. 464 (1982) (to have standing as a taxpayer, plaintiff must challenge an exercise of the taxing and spending power and show that the challenged enactment exceeds specific constitutional limitations on taxing and spending). To the extent that this section merely gives taxpayers or property owners a right of participation in the initial proceeding, no rules of standing are in issue. Statutes may permit persons to participate in court proceedings even though, independently, they would not have the necessary stake to bring or maintain an action. Amicus participation is an example.

But this section goes further. It apparently allows the "intervenor" to appeal any court order or finding even if the parties in the case do not do so. Permitting the "intervenor" to go forward in such circumstances may conflict with Article III requirements. As the Supreme Court stated in *Diamond* v. *Charles,* 476 U.S. 54 (1986): "an intervenor's right to continue a suit in the absence of the party on whose side intervention is permitted is contingent upon a showing by the intervenor that *he* fulfills the requirements of Art. III." (emphasis supplied) Even parties may not appeal unless they are personally aggrieved by a district court's order. *See, e.g., Bender* v. *Williamsport Area School Dist.,* 475 U.S. 534 (1986). And, of course, Congress may not legislatively excuse compliance with Art. III requirements. *See Lujan* v. *Defenders of Wildlife,* 504 U.S. 555 (1992).

CONCLUSION

Court orders directing governing bodies to levy taxes may be sufficiently rare events (and in the future, perhaps non existent) that this legislation is unnecessary. First, the Supreme Court has demonstrated its willingness to reign in the kind of far-flung desegregation decrees which have led to such orders. Second, the Supreme Court has said that tax levy orders, like other orders directly intruding on legislative prerogatives are drastic and exceptional and, may only be imposed as a last resort. Finally, it may be that creative judges can always fashion alternative methods

of enforcement and need not rely on such orders. Yet there may be uncertainties about what is a "rare case," and a piece of legislation that instills caution and structures a judge's determination as to whether and when to employ a tax levy order may be quite useful. With certain modifications, S. 1817 could be that legislation.

Senator GRASSLEY. Mr. Pilon, I thank you, because you responded to a need we had and on very short notice agreed to come and appear before our subcommittee, so I wanted to recognize that.

STATEMENT OF ROGER PILON

Mr. PILON. Thank you, Mr. Chairman, and thank you for making mention of that and also for making mention in your introductory remarks that I am from the Cato Institute here in Washington, because your program has me hailing from Atlanta, GA, where I taught law some 20 years ago, but I have not lived there since then.

In any event, you are quite right. I was asked just yesterday to prepare these remarks. The remarks just literally came off the machine as I dashed over here, so I have not even had a chance to proof them.

Nevertheless, I do want to address some of the larger issues that Professor Cheh mentioned may be underlining this proposal before us. At the end of her remarks, she added that it may be with the whole remedial scheme that the problem rests, and I would submit that that is precisely where it is.

I want to begin, however, by saying that the proposal is, it seems to me, driven by the concern of Mr. Manzullo and others that judicial taxation may, in some sense, be constitutional. I think that you give away too much when you say that. I think that that is a point that should not be conceded. I think that that is precisely the point that needs to be resisted at all costs. It is the point of principle.

I would address it, however, in a rather different way than this bill addresses it. I think this bill is fundamentally mistaken, not least because it gives credence to the idea of judicial taxation as being legitimate in some way. That point should not be surrendered to those who for years have promoted the vast remedial powers of the judiciary that have brought this issue to a head. Yet, by conceding the power, then seeking to limit it, this bill compounds one error with another. It is bad enough that the judiciary wants to micromanage the original problem. Now Congress wants to micromanage the judiciary, and so we have problem compounding problem.

My suggestion is that we step back and look at some of the first principles of the matter, which is what I propose to do here and I have done in my testimony in an outline way. I will do it in an even more summary way here.

No one doubts, of course, that the courts have remedial powers and, in fact, the remedial power in its barest essence amounts to the power to right wrongs in as far as possible by ordering wrongdoers to make the victims of their wrongs whole. Thus, while courts have no power to tax, they have the power to order both private and public individuals and institutions to right the wrongs they cause even if additional taxation may result in a given case.

In such a case, the court has no authority strictly speaking to order the means. It may only order the end which a public entity

may satisfy, in the case of money damages, through means as various as incurring debts, shifting resources, reducing costs, or increasing taxes. It is no proper business of the court to make that call regarding means. If it were, the court would soon be in the business of running the public entity. Unfortunately, the courts are doing that today. Before I get to such situations, though, let me just work my way up very quickly.

The takings issue is a good example of a remedial scheme that is found right in the Constitution. The public entity wants to undertake some project through taking property. It is required to provide just compensation. That is the remedy for the wrong of taking private property, but it is not the business of the court to say how the entity should go about that. The court, in effect, is saying, either pay the person from whom you take the property or you cannot go forward with your project and with your taking.

Now, that applies in a number of other contexts, as well, those very principles. We see it, for example, in the prison context, where the issue of judicial micromanagement and judicial taxation is often found, and I think wrongly so, at least in most cases. Here, you have to look at the premise in the prison context of prisoners do not give up all of their rights when they go to prison. If in a given situation, however, you have a 1 year sentence turning into a death sentence in a prison because of the conditions, you have to have a remedy to address that wrong and that may mean requiring the municipality to address that in whatever way they choose. It does not require imposing taxation, however. That is up to the public entity to determine.

When we look at the public school segregation case, which is what is before this committee, it turns out that we have a very different situation and this is what I think Professor Cheh may have been moving toward. We do not have individually identifiable victims and individually identifiable wrongdoers except insofar as those who suffered from the segregation that led to the case in the first place.

But typically, court-ordered remedies are not backward looking in this ordinary remedial sense. They are forward looking and they are driven by the idea of equality and, indeed, driven by modern theories of egalitarianism, where the aim is to create equality through the remedial scheme, and it strikes me that that is at the core of the problem.

The typical public school desegregation remedy, unlike ordinary remedies, looks hardly at all at the parties. Instead, it looks at what might be called future parties, parties that are neither victims nor wrongdoers. In fact, the remedy has little to do with past victims or past wrongdoers for it is a remedy only in the sense that it seeks to end, not rectify, the wrong.

This raises profound problems. In equalizing the receipt of public services, in this case, education, the goal takes over the remedial scheme. No longer is it a remedy driven by righting the wrong through making the victim whole but by the goal of equality, which is much more of an amorphous idea, and the courts and the judges are driven by this notion of equality, which is in the eye of the beholder in many cases.

It is no accident that you have the Rockford and Kansas City situations. Those situations will be with us 20 years from now if nothing is done about it. What I suggest being done about it is to approach the larger remedial problem that the court is dealing with and have the Congress fashion remedies that are more closely tailored to the wrong at issue, as you do in the criminal law area, rather than leaving it to the court to fashion these remedies.

In other words, give them a scheme of remedies which will not involve them in this kind of activity. Rather than trying to limit their remedial power in a blanket fashion of this kind, give them direction as to what remedies are to be set forth for these wrongs. This will end the need for judicial micromanagement and it will preclude the need for congressional micromanagement, as well.

If the Congress were to fashion such a scheme, it strikes me that we would get back to the basic problem that is at issue here. It is not an issue of judicial taxation except derivatively. It is fundamentally an issue of judicial remedies that in no way are appropriate for the wrongs to be remedied.

[The prepared statement of Mr. Pilon follows:]

PREPARED STATEMENT OF ROGER PILON

Mr. Chairman, distinguished members of the subcommittee: My name is Roger Pilon. I am a senior fellow at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to thank Chairman Grassley for inviting me to testify on S. 1817, the "Fairness in Judicial Taxation Act of 1996." Unfortunately, because the subcommittee's invitation was tendered only yesterday, I have not had time to prepare the kind of statement I would like to have prepared. Nevertheless, I am pleased to share such thoughts as I have on the problem that is before the subcommittee in the hope that I may thereby aid the members in addressing that problem.

There can be no question that "judicial taxation," as Congressman Manzullo called it in his earlier testimony, is a very real and a very troubling problem, both from a practical and from a constitutional perspective. Under our Constitution, judges do not have the power to tax. When they are seen to be taxing, citizens come to feel—owing to the non-responsible, lifetime tenure of the federal judiciary—that they have lost control of their government.

In his own testimony, Mr. Neblock of the Rockford, Illinois, School Board has given the subcommittee some sense of that feeling. His is a compelling account of the devastation that takes hold in a community when its public school system is effectively taken over by the federal judiciary in the course of imposing a far-reaching desegregation scheme. Perhaps the most famous—or infamous—example of this process is the effort to desegregate the Kansas City, Missouri, School District, which has been before the federal courts for nearly 20 years now, and before the United States Supreme Court three times.

At the same time, even those who are deeply troubled by judicial taxation seem reluctant to ban it. Thus, Congressman Manzullo, pointing to the need for judicial enforcement of municipal contracts and public bond issues, concludes that "an outright ban simply would not work."

Thus, the alternative he and others are proposing is in the form of the bill that is before this subcommittee, "which would require that six criteria be met before a federal judge can issue an order, or agree to a settlement, that would have the effect of raising taxes." Those six criteria, in a nutshell, would restrain the remedial power of federal judges and might, depending on the facts in a given case, preclude its exercise.

With all due respect, and in complete sympathy concerning the problem before the subcommittee, I believe this approach to be fundamentally mistaken—not least because it gives credence to the idea that "judicial taxation" is in any way legitimate. That point should not be surrendered to those who for years have promoted the vast remedial powers of the judiciary that have brought this issue to a head. Yet by conceding the power, then seeking to limit it, this bill compounds one error with another. Bad enough that the judiciary wants to micromanage the original problem; now Congress wants to micromanage the judiciary. It won't work—for the same rea-

sons that judicial micromanagement does not work. And it is likely as well to be found to be an unconstitutional intrusion on the power of the judiciary.

Just as hard cases make bad law—as the case of desegregation has done—so too such cases can make bad legislation—as seems to be the case here. Let me try to illuminate my conclusion by working my way up from easy cases, then turn to the problem before the subcommittee.

There is no question, of course, that courts, including federal courts, have remedial powers. And in some cases, those powers may "lead to" or "have the effect of" increasing taxation. But that is not tantamount to having a power to tax. Nor is the distinction merely semantic.

The remedial power of a court, in its barest essence, amounts to the power to right wrongs, insofar as possible, by ordering wrongdoers to do what is necessary to make their victims whole. Thus, while courts have no power to tax, they have the power to order both private and public individuals and institutions to right the wrongs they cause, even if additional taxation may result in a given case. In such a case, the court has no authority, strictly speaking, to order the means. It may order only the end, which a public entity may satisfy—in the case of money damages—through means as various as incurring debt, shifting resources, reducing costs, or increasing taxes. It is no proper business of the court to make that call regarding means. If it were, the court would soon be in the business of running the public entity.

Unfortunately, courts too often today are in just such a business. Before considering that situation, however, let us take a simple, straightforward application of the basic principles, an application not often thought to fall under them involving a Fifth Amendment takings case. If a public entity, in pursuit of some public end, commits the "wrong" of taking someone's property—albeit, permitted under the Fifth Amendment—it may be necessary for a court to order just compensation—pursuant to the amendment's Just Compensation Clause—by way of remedy for that wrong.That is not tantamount to ordering taxation, however, even if additional taxation results from the order. Nor is the Takings Clause authority for the court to tell the public entity just how it must satisfy the court's order. That is the business of the entity. What the court can say—and does say by implication—is that if the compensation is not paid, the taking, and hence the end it serves, cannot go forward.

But those principles apply in the more common remedial case as well, where the public entity cannot simply walk away from its public project—as with the takings example—but must instead be made to remedy some tortious or contractual wrong the entity has committed. In such a case, additional taxation may be required to satisfy a particularly large judgment. Yet no one would say that a court that had ordered such a judgment had ordered a tax increase; for again, the means are matters for the public entity to determine.

There are other contexts, however, in which the issues of judicial taxation and judicial micromanagement do seem to arise, yet on closer examination, they need not. Consider the management of public prisons, which is paradigmatically a state or executive branch function, yet today is sometimes done by over-zealous courts. Here too the principles articulated above apply, even if the application is sometimes more difficult, and often confusing.

What contributes to the confusion is this: the wrong to be remedied in the prison context is not ordinarily remedied by money damages; rather, the wrong arises from ongoing prison conditions, which need to changed—which in turn leads to the charges of judicial taxation and micromanagement. Notwithstanding such charges, the analysis begins with a simple but important premise, namely, that prisoners do not loose all their rights upon entering prison. While it is in large part up to the legislative branch to determine just what rights are and are not retained, that determination is not entirely up to the legislature; for implicit in the Fifth and Eighth Amendments is a requirement that punishment fit the crime—that the remedy imposed on the criminal remedy the wrong by being proportional to that wrong. When the punishment, under certain prison conditions, exceeds the wrong to be remedied, a new wrong arises—this time to the prisoner—which needs to be remedied.

When prison conditions mean that a one-year sentence may be equivalent to a death sentence, courts have authority to remedy such wrongs. Properly, of course, that should be the business of the political branches to do, but when they fail to do it, the court has authority to hear complaints and, if appropriate, order remedies. Adjudicating those complaints will involve the court in assessing prison conditions, of course, and so will tempt the court to try, by way of remedy, to micromanage those conditions. That temptation should be resisted, for it is no business of the court to run a prison, even if the court may properly pass judgment on the conditions before it. And the temptation will be present as well to pass judgment not only

on egregious complaints but on trivial complaints too, which too often happens. Still, however, many courts may abuse their authority—and I except the abuse is rather overstated—the authority is there, failing which the premise would have no force at all, and prisoners would have recourse only to political remedies, which in the nature of the case would be all but non-existent.

Once again, however, in ordering prison conditions to be changed, the court cannot order the public entity to raise taxes. The means for righting the wrong are properly left to the public entity to determine, which may range from raising taxes to shifting resources to reducing prison overcrowding (if that is the wrong) through early or selective releases. Does that mean that the public might be endangered in the name of protecting the rights of prisoners? Yes it does. But one of the basic principles of a free society is that government may not secure rights by violating rights—otherwise a police state could be justified. That principle applies in general—as in the case of the Fourth Amendment protection against unreasonable searches and seizures—and it applies in more narrow cases such as this.

When we apply the principles before us to the case before the subcommittee, however, we start to see the problem. In each of the examples just discussed, there were individually identifiable victims of some wrong, some public entity that caused the wrong, and a remedy aimed at righting the wrong. Typical court-ordered public school desegregation plans, however, are entirely different. They proceed from the wrong of de jure segregation, which is a form of discrimination or exclusion from public benefits that others are receiving or are receiving to a greater extent than are the victims of the segregation. To be sure, that wrong has individually identifiable victims—all those who were so excluded—and individually identifiable wrongdoers—the members of the public who ultimately authorized the exclusion. But the typical public school desegregation remedy—unlike ordinary remedies—looks hardly at all to those parties. Instead, it looks to what might be called "future parties"—parties that are neither victims nor wrongdoers. In fact, the remedy has little to do with past victims or past wrongdoers, for it is a "remedy" only in the sense that it seeks to end, not rectify, the wrong.

That raises profound problems, however, for ending the wrong, in this context, is driven by the idea of equalizing the receipt of the public service at issue—education. That "goal" thus takes over the remedial scheme. No longer is the remedy driven by righting the wrong through making the victim whole but by the goal of equality, which is a much more amorphous idea. Indeed, it is a remedy tailor-made for judicial overreaching at its worst. For inequality can manifest itself in an infinite variety of ways, and each of those ways is in principle subject to judicial recognition and redress. The court is thus drawn into the infinitely complex business of micromanaging the school system toward the goal of equality—which is never satisfied because it never can be satisfied. It is no accident that the Kansas City system is still under court management some 20 years after the court first stepped in. Rockford's system will be under court management for that long and longer too unless something is done about it. But what is to be done?

A ban or restraints on "judicial taxation" will not solve the problem, not least because whether a given court order "requires" a tax increase—the language of the present bill—is itself a political question that no court could determine before issuing an order. Where the problem lies, rather, is in the remedial approach the court has taken. Rather than simply end public discrimination and compensate its victims, to the extent possible, courts, driven by modern egalitarian theories, have taken it upon themselves to bring about "equality." The Equal Protection Clause of the Constitution requires no such result, even if we did know what it meant, which we don't. If the Congress were to fashion a systematic remedial scheme for remedying past discrimination, much as it fashions such schemes in the criminal law area, it would go far toward giving guidance to the courts in this area. In the end, we do not need congressional micromanagement to check judicial micromanagement. We need rather to get back to basics.

Senator GRASSLEY. Thank you, Mr. Pilon.

I want to ask Congressman Manzullo to give us his statement, because he had to go vote previously, and then we would have questions of all of you. Would you proceed, please?

STATEMENT OF HON. DONALD A. MANZULLO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Representative MANZULLO. Thank you, Senator. I had three roll-call votes during the course of the hearing, but it is always that way.

I appreciate the opportunity to appear before this distinguished panel, both as a person on the panel and as a person in the position of asking questions. Chairman Grassley and other distinguished colleagues, I appreciate the opportunity to appear before you today to discuss the very important issue of judicial taxation and its impact on local communities.

Throughout my tenure in the House of Representatives and before I became a Member of Congress, I have watched with great interest cases in which Federal judges issue orders that, in one way or another, have the effect and imposition of increasing, levying, or assessing State or local taxes. I find it interesting from a constitutional standpoint because the Founding Fathers were explicit in delineating what branch of government has the authority to levy and collect taxes. A focal precept of our Constitution is that taxation without representation is tyranny, and therefore it is wrong.

It is apparent that when Federal courts exceed the proper boundaries of their limited jurisdiction and authority under the Constitution that they impermissibly intrude on the legislative function by imposing orders which have the effect of raising taxes, leaving communities in total disarray.

School district 205 in Rockford, IL, which encompasses several surrounding communities, is a primary example. Here, a Federal judge issued an order having the impact of raising property taxes to pay for past desegregation injustices. The complaints I have received from constituents include the fact that taxpayers are funding millions of dollars for a school master, attorneys' fees, which to date are over $12 million, consultants, among other questionable items, yet they see little money going to educate their children. They have also complained that huge spikes in real estate taxes are making homes in Rockford very difficult to sell. Senior citizens have advised me they can barely pay the taxes on their homes.

The situation with the Rockford schools is dividing, if not destroying the city. The price tag has already reached $80 million, with another $25 million already committed to be spent. This is a metropolitan area of only 250,000 people. Projections are that the court order will run up to 20 years at $25 million a year. The people cannot continue to take on this huge cost while at the same time pay State and Federal taxes and lead quality lives.

But Rockford is not the only community affected by judicial taxation. The Federal judge in Kansas City, MO, ordered taxes increased and spent over $1 billion, yet there has been little improvement in the school system or with regard to desegregation numbers. In fact, the judge in Kansas City took it upon himself to determine the salaries of everybody. He ordered a model United Nations built. He ordered an Olympic-sized swimming pool built and ordered the school district to purchase a farm. The district judge is totally running local education, and that is wrong and that has to stop.

Judicial taxation is not, however, limited to school districts. Federal judges have ordered tax increases to build public housing and expand jails. Any State or local government is subject to such rulings from the Federal courts.

To address this issue, I have worked with members and staff of this committee, as well as House members who are concerned about this issue, to write legislation that addresses this specific issue. In fact, our staff and Senator Grassley's staff have worked for no less than 8 or 9 months, coming up with language that we believe will pass constitutional muster.

First, let me be clear that this legislation is not about desegregation or any other decision where a Federal law has been broken. It is about taxpayers paying for Federal court remedies involving the raising of taxes without permission of the taxpayers. A court-ordered remedy should be tempered by the community's ability to pay for it without raising taxes.

The legislation which I sponsored in the House, H.R. 3100, a counterpart to S. 1817 introduced by Chairman Grassley and Chairman Hatch, does not ban judicial taxation. However, it does address the fact that the Supreme Court has found that Federal courts may order, in limited circumstances, that taxes be levied.

I understand the position of members and Senators who loathe judicial taxation and want it banned outright. My research has led me to believe that an outright ban on judicial taxation would not work, and let me explain briefly why.

Municipalities and States enter into legal contracts and bond issues. Businesses and individuals who enter into such contracts or purchase municipal bonds would have no guarantee that obligations would be met if a judge were unable to enforce these obligations. Thus, courts have been constitutionally allowed by the Supreme Court to enter structural injunctions, that is, an order structuring how repayment of the obligations is to be made. This type of judicial order would almost certainly be precluded under an outright ban, and thus an outright ban simply would not work.

H.R. 3100 and S. 1817 take an alternative approach which would require that six criteria be met before a Federal judge can issue an order or agree to a settlement that would have the effect of raising taxes. The six criteria the court would have to approve under the legislation are as follows.

One, that there are not other means available to remedy the deprivation in question.

Two, such a tax would not contribute to or exacerbate the deprivation intended to be remedied.

Three, the proposed tax will not result in loss of revenue for the affected political subdivision.

Four, the proposed tax will not result in a loss or depreciation of property values.

Five, the tax will not undermine the taxing authority set up by the political subdivision.

And six, the plan submitted by the political subdivision will not effectively redress the deprivations at issue.

An additional point to make is that because local taxes are extended or reworked each year, a judge would have to make these findings annually.

Ultimately, if the school board, municipality, or State government feels that taxes have to be raised to address problems, then it should go to the people and ask for an increase. Otherwise, political subdivisions should work within their means. There is no such thing as a school district tax dollar, just as there is no such thing as a Federal tax dollar. The money belongs to the people. Judicial taxation is a back-door method to take people's hard-earned money without representation. However, since judicial taxation cannot be banned outright, our approach sets up the very strict criteria necessary to restrict it.

There are many people who are willing to make a positive contribution to solving these problems. By relieving the State and local governments of the burden of judicial taxation, the people of a State, city, or school district will be able to step forward and be part of a solution that is best for the community.

The people of Rockford, IL, and other communities across our country continue to be placed in situations where the Federal courts enter remedies to be paid for with a checkbook that has no limits. Every family and governmental body has to live within its own budgetary restraints. The Federal courts must be held to the same standards.

I thank you for the opportunity to appear here today.

Senator GRASSLEY. Thank you.

I will start with you, Mr. Neblock. I think at the end of your remarks, you characterized for us, and I guess if that is what you were doing, just repeat it, how this has impacted the community. How do the people at the grassroots feel or think about the action that has been taken through the Federal courts? I want that repeated so that we have on the record how this impacts the common, ordinary citizen, because most of these committee hearings, particularly when you deal with constitutional law, are intellectual exercises. So kind of express that again for me.

Mr. NEBLOCK. I think the part you are asking about, there is an air of sadness, despair, and cynicism.

Senator GRASSLEY. Yes.

Mr. NEBLOCK. The people of Rockford honestly in their hearts believe that segregation of our children is wrong. What has happened by the master and the magistrate taking over the district, the one avenue left to our board was that of financing, up until yesterday, when the magistrate has taken control of that, as well.

The people in our town, there are a lot of elderly who live under very limited resources. We watch them as they sell their homes, leave our district. We watch them and read in the papers the number who, because of their taxes, their houses are being sold out from underneath them. Everybody that is paying the price right now are those who least can afford to pay the price.

We have a town that is in complete distress, complete disorganization. Rather than unifying a city to allow it to work together to rectify a wrong, we have a city that is being divided amongst itself between those who have and those who have not.

Senator GRASSLEY. I would start with Mr. Lindseth on a second point, but because it deals with wanting to know any of the experiences you have had with special masters, I would ask any of you to respond. And you did deal with this at the tail end of your re-

marks, but again, for emphasis, obviously, you have had a pretty impressive amount of experience dealing with court-run school systems and what I call unfunded judicial mandates, so I am interesting in you summarizing for us the benefits of your experiences with special masters.

Mr. LINDSETH. Thank you, Senator. First of all, I want to make it clear that not all Federal courts use special masters, and, in fact, quite a few of them do not. For example, in the Georgia school districts, there were no special masters, panels of experts, any of that. And coincidentally, they are all out from under court order, not all of them, but certainly Savannah, Atlanta, DeKalb County. They have all been released from court order.

But they are found in quite a few cases, and I mentioned Kansas City and St. Louis. They do not call them special masters there but they have similar powers.

From being in the court and trying to end court supervision because those school districts, or at least the State believes that the vestiges of the dual school system have been eliminated, the problem is that you put on your whole case, you have experts and they are all cross examined and then the special masters, they are not subject to any discovery, so you cannot find out in advance what their beliefs are. They are allowed to submit testimony. You cannot cross examine them, as you could any ordinary expert. They have access that nobody else has. It varies from court to court, but in some courts, they have easy access to the judge, whereas the parties when they go see the judge have to have the other parties present.

So all of these measures of what, in any other lawsuit, would be due process, the right to cross examine witnesses, the right to be present with the judge when the other side is present, the right to take discovery, you do not have any of this. Now, it varies from court to court, but certainly in St. Louis and in Kansas City, that is the situation you face. It is a helpless feeling. You are captive to somebody who has enormous power and which you are basically precluded from responding to as you would in any other normal lawsuit.

Senator GRASSLEY. Let me bring Professor Cheh into this but with a specific question along the same line. Do you foresee any constitutional problems with Congress forbidding the use of special masters? Second, does Congress' authority under article III of the Constitution permit Congress to forbid the use of special masters? Then you can also have comment on the question I asked Mr. Lindseth.

Ms. CHEH. In terms of your overall power, I would think not, because these are devices that courts can use to assist themselves but they need not be ones that they have access to no matter what. In fact, if you were thinking along those lines, and just hearing all of the witnesses together, I am thinking in my own mind about maybe the larger questions and how they ought to be approached.

When Mr. Pilon was talking about the fundamental wrong of desegregation and whether we have gone astray there, and largely, we have to think about that because the remedies are driven by the wrong, I am not so sure that that would be the best way to attack

the problem, though it would certainly be the most direct, but you do have this problem between courts and Congress.

On the other hand, if you do start thinking about remedies in a larger way, other than this current bill about taxation, and Mr. Pilon was saying, well, maybe you might want to think about a list of remedies that you might suggest that would be available to vindicate various wrongs, and that seems to make a lot of sense, to devote one's energies there.

As part of that overall thinking, you might want to think in terms of masters and their appropriate role. It is not just simply eliminating them, though I think your power would extend that far, to answer your question directly, but perhaps providing that if they are used, that maybe certain procedural devices be put in place so that, for example, the foundation of the master's own not only expertise but also views on various things can be subject to examination. Maybe there ought to be objections that can be lodged on that basis and so on.

So I would answer yes, I think you do have jurisdiction, but my larger point is that maybe the focus on a broad range of remedies might be more helpful than perhaps this particular legislation, which as Mr. Pilon mentioned and I would emphasize, and I thought I gently did in my testimony but maybe I should be more explicit, the need to direct the governing body to come up with money is always going to be dependent upon the scope of the judge's order to say, here is what you have to do.

If the scope of that order is such that the municipality says, "We cannot pay," or "There is a State statute that blocks us from paying," even if you stop the judge from ordering a tax increase, which the Supreme Court says you should not do, and you simply say, "Well, come up with the money," you could also say to the governing body, "Well, we are going to hold you in contempt. We are going to fine the city. We are going to say, take the money from this source or that source." There are lots of other things they could do, and still, you are not dealing with the underlying problem of the overall plan being far in excess, perhaps, of what the constitutional wrong is.

Maybe a better way to think about it is to make this part of, as I said, a more general sort of congressional list of suggestions or options, if you will, to Federal courts about what kind of remedies they should employ, and maybe you cannot get around the constitutional limit, as I said before. You cannot tell courts, if you are going to give them jurisdiction and they find a constitutional wrong, you cannot say, "You cannot use any remedy under any circumstances even if you find it is absolutely necessary."

I do not think you can go that far. But I think it would be very salutary to say, here is a suggested approach. I think judges would be governed by that, or would attempt to live within that, to the extent possible, and it may be a sensible thing to think about.

Senator GRASSLEY. Mr. Pilon.

Mr. PILON. Yes. Let me expand upon some points that Professor Cheh just mentioned.

Ms. CHEH. I think we are a tag team.

Mr. PILON. Yes, and yet we were supposed to be here on opposite sides of this issue. Professor Cheh was my constitutional law teach-

er at George Washington University. I am one of the more obstreperous students, I might note, in class.

But in any event before you returned, Congressman Manzullo, I mentioned my own reservations about this bill, not least because I think it gives away too much. It gives away the principle of the matter, namely that we should not concede to the other side that there is any power whatever for judicial taxation. In my prepared testimony, I have addressed the issues that you raised in yours because I had the benefit of that before preparing my testimony.

Just to make a narrow point and then to go over to the larger point, with respect to the language of the bill, it says that the court cannot enter an order that requires a State to increase taxes. Well, of course, the problem is, the court has no way of determining that. That is a political question. To satisfy any order, a municipality might increase taxes, it might sell assets, it might lay off personnel. There are any number of means available to it.

So the court has no way of knowing whether its order would or would not require increasing taxes, and, therefore, the court would be in no position to issue an order on penalty of being in violation of this provision of the statute——

Representative MANZULLO. Could you yield on that?

Mr. PILON [continuing]. Which a court itself would have to determine in the end, anyway.

Representative MANZULLO. Could you yield on that?

Mr. PILON. Sure.

Representative MANZULLO. I know you had 1 day's notice to come, but what this bill does is it says to the courts that before you enter an order, you must determine the impact of that order on the community. See, what is going on now is really foolish. The court says, here is the remedy. We have gotten together with the master and all these experts and they all come out of Kansas City, and here is the order. The Rockford School Board has a budget of, what is it, $50 million a year, Mr. Neblock?

Mr. NEBLOCK. I think it is $140 million.

Representative MANZULLO. $140 million a year. And now, along comes the court that says, oh, by the way, it is going to cost you $25 million a year for this desegregation order. That is a sizable chunk of money.

What we are saying very simply is this, that before the court enters an order, it has to determine the impact, the financial impact of that order on the community, because the purpose is to bring in the goalposts and say, these are the taxing rates. Allow people to come into court and say what would the effect of taxes be on the community.

Mr. PILON. But again, that is a political question.

Representative MANZULLO. It is not a political question.

Mr. PILON. The community could as easily say, we are going to sell off that property we own outside of town to satisfy this judgment and do it that way rather than raise taxes. There is no way that a court has the resources to sit there and determine——

Representative MANZULLO. Mr. Pilon, the Rockford School District is going to have 400 experts, the school district. These are administrators and experts coming in, and staff as the court calls them. When you say that they have no resources to determine the

economic impact, I mean, we have realtors that can come in and testify. People can testify as to the impact of this order.

This legislation is very, very simple. It gives some common sense to the Federal courts and says, look here. Just as the legislature, just as the Congressional Budget Office and the House of Representatives have to determine the impact of legislation on people, so must a Federal judge determine the impact of its order on the people. It is just very, very common sense.

Mr. PILON. We are not going to resolve this issue here, but there is the larger point that I do not want to lose sight of.

Senator GRASSLEY. Please finish your point.

Mr. PILON. That is this. Courts are purporting today to be remedying wrongs. That is the first point. But the wrong to be remedied here is segregation. That wrong ended ages ago, and yet these courts are still in business remedying that wrong. And so what you have here is not a court that is remedying a wrong. That is just the ruse. The court is really pursuing a public goal, namely, seeking to bring about equality in education as measured by anybody whom you want to look to to measure this. In this case, it happens to be these local magistrates who are doing that.

As a result, what you have with legislation like this is just tinkering at the edges. You are not going to the real issue, and that is the scope of the remedial authority. Now, interestingly, in *Jenkins III*, that is what I think Rehnquist was moving toward, but in a very tentative way, by talking about the intradistrict versus interdistrict issue.

But still, taken to its logical conclusion, I think that opinion, and the next time the issues come before the Court, depending upon what the Court looks like, which the members of this subcommittee will have something to say about, the next time that this comes before the Court, it may very well be that the Court will be looking at the whole remedial scheme in a much larger way and will ask the fundamental question, is this a remedy which is addressing the wrong or is this a remedy in search of a wrong, there being no constitutional wrong at issue?

Finally, I would note, if you want to know what the real practical solution to this problem is, it is vouchers. Get the government out of the business of education. Let people send their kids where they want to send them and this issue will appear overnight and with it the magistrates, to boot.

Senator GRASSLEY. You must come from the Cato Institute.

Mr. PILON. Yes. [Laughter.]

Senator GRASSLEY. Did you want to add to this, and then I am going to quickly yield so he has a round of questioning before I finish.

Mr. LINDSETH. I will just add that in the latest round of the *Missouri* cases in the Supreme Court, *Jenkins III*, aside from the interdistrict aspects, there is also language in the opinion that can be read as saying you can only apply these remedies to the "victims." Now, exactly what those victims are, people will argue different ways. But for something——

Mr. PILON. Those victims are 50 years old now.

Mr. LINDSETH. That is right, and obviously, something that happened 40 years ago, it is hard to argue that children going to those

schools today are victims. But the Supreme Court is moving to limit the jurisdiction, but there is still, and the main point I wanted to make is there is still enormous discretion, depending on the feelings of the Federal judge.

We have been trying in St. Louis to get the interdistrict components of the remedy ended, because *Missouri* v. *Jenkins* says clearly you cannot have them unless you have findings of liability based on interdistrict violations. That was a year and a half ago and we cannot—the case has now been referred to a settlement coordinator with an indefinite schedule as to when these settlement talks are going to be. In the meantime, the State is paying for this particular thing at the rate of $100 million a year.

This is a remedy that the Federal court, the Supreme Court itself has basically said is unlawful and beyond the courts to order. But such is the discretion of the lower courts, that it is going on at a cost of $2 million a week and it will continue to go on indefinitely. So that just illustrates the discretion and power that I am talking about here.

Senator GRASSLEY. Congressman, I will yield you 5 minutes.

Representative MANZULLO. Thank you, Senator.

Let me just make the statement, Mr. Pilon, the last paragraph that occurs in Senator Grassley's bill and mine makes it very clear, and I know you have not had a chance to examine the legislation, that these bills do not validate judicial taxation. If this were enacted into legislation and the next day the Supreme Court said judicial taxation is unconstitutional across the board, then this piece of legislation would have no meaning. It would not create a right that otherwise might not exist. We were very careful in doing that, and the reason we drafted the legislation was because of the outcry coming from our constituents.

I wanted to ask you a question, Mr. Neblock. In your testimony, fortunately, I read it in advance, you stated that you noted a depreciation in real estate property values.

Mr. NEBLOCK. Yes, sir, Congressman.

Representative MANZULLO. Where did you get that information?

Mr. NEBLOCK. From local realtors. I got it from, I do not remember the real estate name, but it was Mike Dunne and his real estate firm. They give me the facts and figures on depreciation in house sales and the length of time and the number of homes on the market at this time.

Representative MANZULLO. Professor Cheh, first of all, I think you agree that Congress has the authority to limit the jurisdiction of the Federal district courts, the inferior courts.

Ms. CHEH. Without question.

Representative MANZULLO. It is under the Constitution. What we are doing in this case is not saying to the courts this particular field of legislation is off limits but simply putting in parameters within which the court can act before it imposes judicial taxation. As a professor of constitutional law, your opinion as to whether or not a bill like this, in your mind, would pass consitutional muster, at least the notion of it, maybe not perhaps all the wording in it.

Ms. CHEH. The notion of it, yes, and as I said, it seems to me that as long as you do not remove from the Federal district court any essential remedy, that is to say, any remedy without which the

harm could not be made whole, then you are within your powers. So the question is, have you done that?

I think what you have done is, in a salutary way, as I mentioned in the testimony, I think by instilling caution, by forcing judges to make these findings, you may be simply making them adhere to what the Supreme Court has been saying as a limit on these approaches by saying they should be last resort. So you are instilling that caution but you are also structuring the judge's decision, and that is helpful, too. In fact, in terms of thinking about masters and judges, use of masters and so on, instead of just simply accepting conclusions that may be drawn, the judge has to make findings, and I think that is a helpful discipline.

I do think some provisions, though, the ones that say that in no event—you would have to find that in no event would it reduce property values, or in no event would it increase or reduce revenues to the city or in no event would it supercede applicable laws about limits of taxation, I think there, you are on shakier ground, because there, those particular factors may have nothing to do with whether in a given case the essential remedy would be in order—I know we are saying judicial taxation—but would be in order, directed to the governing body, come up with this money, because you may say to them, come up with this money, and as a consequence, you may have reduction in revenues or you may have also an additional order by a court saying, in any statute that you may have perhaps imposed in anticipation of this litigation that limits the amount of money that you can raise, that may have to give way. So there are some things in there that I think violate that outer perimeter, but it is an outer perimeter. So yes, I think that this is certainly within your powers.

I think I have answered that directly, but indulge me. I just wanted to make a couple of points about some of the other things that were said here. In terms of segregation orders, we have to look at the picture of what has happened over a period of time to understand why we are where we are today.

The truth of the matter is, when Mr. Pilon talks about who are the victims, trying to figure out who are the victims, the issue in segregation is not just an order to a governing body, stop having an official system of one school for whites and one school for blacks. It is also doing away with the vestiges, the byproducts of those dual systems and we cannot close our eyes to the fact that those dual systems operated where you had white schools that were well endowed and you had black schools and black districts that were poorly endowed. They were rotten schools, in many instances.

So in order to redress the harm, to put things where they would have been if you had not engaged in this unconstitutional behavior, if you had not funneled money and sucked money away from the minority schools, the orders that courts have been imposing have that harm in mind. So they want to see that the school system not only officially says, "OK, we are not segregating anymore, anybody can go to whatever school they want," but that you also take care of the underlying problem that you created by that dual system.

Once the court said that that is part of the harm, then you get into this question about how are you going to redress it. As I said, it would not be enough to say, "We are not segregating anymore."

You have to put those schools in a position where they would have been had you not engaged in unconstitutional behavior, and that is sort of the nub of the problem.

On top of that, you had a period of time where there was massive resistance in certain areas, foot-dragging, all sorts of tactics were used, 5 years were going by, 10 years were going by, 15 years were going by, and as a consequence of that, the Supreme Court sanctioned, if you will, broad powers to lower Federal courts to get with the scheme, move ahead, do something now, because by denying a remedy here for 10, 15 years, you have denied constitutional rights all the while. So get some orders in place. We are sanctioning you, go ahead, get some orders in place that take care of the problem.

Well, they were given the green light then to fashion broad-based remedies, and although courts, of course, take the proposals by the parties in the case, courts became or tended to become in some instances far more activists. They may have gone well beyond what they should have gone. So now you see the phenomena of the Supreme Court getting back in the picture, getting back in the picture not to say, do something, have orders that redress the harm, but rather, whoa, where have you gone with this?

In the *Kansas City* case, and I have had no direct involvement, but just reading the accounts and the reports, the Supreme Court reports and the lower court reports, this judge felt that as a vestige of past discrimination, you could not put the situation where it would have been in a school system that is now predominately black. What you needed to do was fix up those schools and provide for integration, but since it was only an intradistrict harm, the judge ordered an interdistrict remedy, by trying to make these schools these fabulously endowed magnet schools.

But the Supreme Court said, no, you cannot do that. You cannot order an interdistrict remedy for an intradistrict harm. It has also gotten back into the picture by saying, hey, at some point, these orders have to end. They do not go on perpetually. The Supreme Court has come back, perhaps not to the extent some would like, and maybe there is a lot more it has to do, but in now putting the discipline on the judges that they earlier, in response to a different sort of problem were saying, move forward.

So we come to this table now with that as the background, and in terms of what Congress can do, what this committee can do to restrain lower Federal court judges, I am not so sure that the way we define the constitutional harm is wrong, and in any event, I am not so sure even if it is wrong that Congress can direct a reinterpretation of constitutional principle should be left to the courts.

Instead, what I think may be a useful thing to think about, as I said before, is thinking about offering, for lack of a better terminology or something, a charter of remedies that Federal district courts ought to think about if they face problems like this, and then, even though some of them may not be binding because, again, you cannot leave that outer perimeter of the essential remedy that you need, I think that it may have the effect of having lower Federal courts try to comply with remedies that have been outlined, to the extent they redress the harm.

Representative MANZULLO. I asked the question and it is an excellent answer.

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Senator GRASSLEY. I am going to have to call the meeting to a close here. I had more questions, and I think Senator Heflin may have had some, so this gives me an opportunity to say what I should have said at the beginning of the meeting. Because everybody cannot be here, you may get some questions in writing. I think normally 2 weeks, we would like to have a response. You may not get many, but I know I have one here that I have to send to you.

I am going to have to call the meeting to an end and I thank you all very much for your testimony. Thank you very much.

Mr. NEBLOCK. Thank you.

Mr. LINDSETH. Thank you.

Ms. CHEH. Thank you.

Mr. PILON. Thank you, Senator.

Senator GRASSLEY. The hearing is adjourned.

[Whereupon, at 3:35 p.m., the subcommittee was adjourned.]